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British Ruling Cases

FROM
COURTS OF GREAT BRITAIN
CANADA, IRELAND, AUSTRALIA AND
OTHER DIVISIONS OF THE
BRITISH EMPIRE

EXTENSIVELY ANNOTATED

VOLUME V

THE
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TABLE OF ABBREVIATIONS.

[1891] A. C. ..... Law Reports, Appeal Cases (1891 onwards.)
Ad. & El. ..... Adolphus and Ellis. Q. B.
Addams Eccl. Rep. ..... Addams, Ecclesiastical.
Al. & Nap. ..... Alcock & Napier (Ireland).
Aleyn . . . . Aleyn. K. B.
Alta. R. ..... Alberta Law Reports.
Amb. ..... Ambler. Ch.
Ander. ..... Anderson. C. P.
Andrews. ..... Andrews. K. B.
Anster. ..... Anstruther. Ex.
App. Cas. ..... Law Reports, Appeal Cases (1876–1890).
Arn. & H. ..... Arnold and Hodges. Q. B.
Arnold ..... Arnold. C. P.
Asp. Mar. L. Cas. ..... Aspinall. Maritime Cases.
Atk. ..... Atkyns. Ch.

Ball & B. ..... Ball and Beatty. Ch. (Ireland).
Bar. & Arn. ..... Barron and Arnold. Election.
Bar. & Au. ..... Barron and Austin. Election.
Barn. & Ad. ..... Barnewall and Adolphus. K. B.
Barn. & Ald. ..... Barnewall and Alderson. K. B.
Barn. & C. ..... Barnewall and Cresswell. K. B.
Barnard, Ch. ..... Barnardiston. Ch.
Barnard, K. B. ..... Barnardiston. K. B.
Batty ..... Batty. K. B. (Ireland).
B. C. ..... British Columbia Reports.
B. C. C. ..... Lowndes and Maxwell. Bail Court.
B. C. Rep. ..... Saunders and Cole. Bail Court.
Beat. ..... Beatty. Ch. (Ireland).
Beav. ..... Béavan. Rolls Court.
Bell ..... H. L. (Scotland).
Bell, C. C. ..... Bell. Crown Cases.
Best & S. ..... Best and Smith. Q. B.
Bing. ..... Bingham. C. P.
Bing. N. C. ..... Bingham. New Cases. C. P.
Bligh ..... Bligh. H. L.
Bligh, N. R. ..... Bligh. New Reports. H. L.
Bos. & P. ..... Bosanquet and Puller. C. P.
Bos. & P. N. R. ..... Bosanquet and Puller. New Reports. C. P.
Bott Poor Law Cas. ..... Bott's Poor Laws.
B. R. C. ..... British Ruling Cases.
Bro. Ch. ..... Brown. Ch.
Brod. & B. ..... Broderip and Bingham. C. P.

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Bro. P. C. ..... Brown. Cases in Parliament.
Brown & L. ..... Browning and Lushington. Adm.
Buck ..... Buck. Bky.
Bull. N. P. ..... Buller's Law of Nisi Prius.
Bulstr. ..... Bulstrode. K. B.
Bunbury ..... Bunbury. Ex.
Burr. ..... Burrows. K. B.
Burr. Sett. Cas. ..... Burrows. Settlement Cases.

Cab. & El. ..... Cababé and Ellis. Nisi Prius.
Cald. ..... Caldecott. Settlement Cases.
Cameron (Can.) ..... Cameron. Upper Canada, Q. B.
Campb. ..... Campbell. Nisi Prius.
Canadian Rep. A. C. ..... Canadian Reports Appeal Cases.
Can. Crim. Cas. ..... Canadian Criminal Cases.
Can. Exch. ..... Exchequer Court of Canada Reports.
Can. Law Times ..... Canadian Law Times (Ontario), Canadian Law Times Occasional Notes (Ontario).
Can. L. J. ..... Upper Canada Law Journal, N. S. and Canada Law Journal.
Can. S. C. ..... Supreme Court of Canada Reports.
Car. & K. ..... Carrington and Kirwan. Nisi Prius.
Car. & M. ..... Carrington and Marshman. Nisi Prius.
Car. & P. ..... Carrington and Payne. Nisi Prius.
Carter ..... Carter. C. P.
Carth. ..... Carthew. K. B.
Cary ..... Cary. Ch.
Cas. t. Hardw. ..... Cases temp. Hardwicke. K. B.
Cas. t. Talb. ..... Cases temp. Talbot. Ch.
C. B. ..... Common Bench Reports.
C. B. N. S. ..... Common Bench. New Series.
[1891] Ch. ..... Law Reports, Chancery (1891 onwards).
Ch. Cas. ..... Cases in Chancery.
Ch. Cas. Ch. ..... Choice Cases in Chancery.
Ch. Chamb. Rep. (Can.) .... Chancery Chamber Reports (Ontario).
Ch. D. ..... Law Reports, Chancery (1876–1890).
Chitty ..... Chitty. Bail Court.
Clark & F. ..... Clark and Finnelly. H. L.
C. L. Ch. ..... Common Law Chamber Reports (Ontario).
C. L. R. (Can.) ..... Common Law Reports (1853–1855).
Coke ..... Coke. K. B.
Colles ..... Colles' Cases in Parliament.
Colly. Ch. Cas. ..... Collyer. Ch.
Colt. ..... Coltman. Registration.
Comb. ..... Comberbach. K. B.
Com. Cas. ..... Commercial Cases (1895 onwards).
C. L. R. (Austr.) ..... Commonwealth Law Reports (Australia).
Comyns Rep. ..... Comyns. K. B.
Con. & L. ..... Connor and Lawson. Ch. (Ireland).
Cooke & Al. ..... Cooke & Alcock (Ireland).

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Cooper ..... Cooper. Ch.
Coop. t. Brougham ..... Cooper. Cases temp. Brougham.
Coop. t. Cott. ..... Cooper. Cases in Chancery temp. Cottenham.
Cowp. ..... Cowper. K. B.
Cox, C. C. ..... Cox. Crown Cases.
Cox Ch. Cas. ..... Cox. Ch.
C. P. Cooper ..... C. P. Cooper. Ch.
C. P. D. ..... Law Reports, Common Pleas Division (1875–1880).
C. R. [1908] A. C. ..... Canadian Rep. Appeal Cases.
Craig & Ph. ..... Craig and Phillips. Ch.
Craw. & D. (Ir.) ..... Crawford and Dix (Ireland).
C. Rob. ..... Sir C. Robinson Adm. (1798–1808).
Cro. Car. ..... Croke's Rep. temp. Charles I.
Cro. Eliz. ..... Croke's Rep. temp. Elizabeth.
Cro. Jac. ..... Croke's Rep. temp. James I.
Cromp. & J. ..... Crompton and Jarvis. Ex.
Cromp. & M. ..... Crompton and Meeson. Ex.
Cromp. M. & R. ..... Crompton, Meeson and Roscoe. Ex.
Ct. App. Rep. N. Z. ..... Court of Appeals Reports (New Zealand).
Ct. of Sess. Cas. ..... Court of Session Cases (Scotland).
Curt. Eccl. Rep. ..... Curteis. Eccl.

Daniell ..... Daniell. Ex. Eq.
Dans. & Ll. ..... Danson and Lloyd. Mercantile.
Dav. & M. ..... Davison and Merivale. Q. B.
Deacon & C. ..... Deacon and Chitty. Bky.
Deacon Bankr ..... Deacon. Bky.
Dears. & B. C. C. ..... Dearsley and Bell. Crown Cases.
Dears. C. C. ..... Dearsley. Crown Cases.
De G. ..... De Gex. Bky.
De G. & J. ..... De Gex and Jones. Ch. App.
De G. & Sm. ..... De Gex and Smale. Ch.
De G. F. & J. ..... De Gex, Fisher and Jones. Ch. App.
De G. J. & S. ..... De Gex, Jones and Smith. Ch. App.
De G. M. & G. ..... De Gex, Macnaghten and Gordon. Ch. App.
Den. C. C. ..... Denison. Crown Cases.
Dick. ..... Dickens. Ch.
Dodson, Adm. ..... Dodson. Adm.
Dougl. K. B. ..... Douglas. K. B.
Dow ..... Dow. H. L.
Dow & C. ..... Dow and Clark. H. L.
Dowl. & L. ..... Dowling and Lowndes. Practice Cases.
Dowl. & R. ..... Dowling and Ryland. K. B.
Dowl. P. C. ..... Dowling. Practice Cases.
Dowl. P. C. N. S. ..... Dowling. Practice Cases. New Series.
Drew. ..... Drewry. Ch.
Drew. & S. ..... Drewry and Smale. Ch.
Drink. ..... Drinkwater. C. P.
Dru. ..... Drury. Ch (Ireland).

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Drury & Wal. .....Drury and Walsh. Ch. (Ireland).
Drury & War. .....Drury and Warren. Ch. (Ireland).
Dunlop .....Scotland.
Dunlop, B. & M. .....Scotland.
Dyer .....Dyer. K. B.

East .....East. K. B.
East, P. C. .....East's Pleas of the Crown.
Eden .....Eden. Ch.
Edw. Adm. .....Edwards. Adm.
El. & Bl. .....Ellis and Blackburn. Q. B.
El. & El. .....Ellis and Ellis. Q. B.
El. Bl. & El. .....Ellis, Blackburn and Ellis. Q. B.
E. L. R. .....Eastern Law Reporter.
Eng. L. & Eq. Rep. .....English Law and Equity Reports.
Eng. Rul. Cas. .....English Ruling Cases.
Eq. Cas Abr. .....Equity Cases Abridged.
Eq. Rep. .....Equity Reports (1853–1855).
Esp. N. P. .....Espinasse. Nisi Prius.
Exch. .....Exchequer Reports (1848–1856).
Ex. D. .....Law Reports, Exchequer Division (1875–1880).

Falc. & F. .....Falconer and Fitzherbert. Election.
Fitzg. .....Fitzgibbon. K. B.
Flan. & K. .....Flanagan and Kelly. Rolls (Ireland).
F. Mocre .....Eng. K. B.
Fonbl. N. R. .....Fonblanque. Bankruptcy.
Forrest .....Forrest. Ex.
Fort. .....Fortescue. K. B.
Fost. & F. .....Foster and Finlanson. N. P.
Foster .....Foster. Crown Cases.
Fox .....Fox. Registration.
Fox & S. .....Fox & Smith (Ireland).
Freem. Ch. .....Freeman. Ch.
Freem. K. B. .....Freeman. K. B.

Gale .....Gale. Ex.
Gale & D. .....Gale and Davison. Q. B.
G. Cooper .....Sir G. Cooper. Ch.
Giff. .....Giffard. Ch.
Gilb. Eq. Rep. .....Gilbert. Ch.
Glyn & J. .....Glyn and Jameson. Bky.
Godb. .....Godbolt. K. B.
Gow, N. P. .....Gow. Nisi Prius.
Grant Ch. (U. C.) .....Grant's Chancery Reports (Ontario).

Hagg. Adm. .....Haggard. Adm.
Hagg. Consist. Rep. .....Haggard. Consistory.
Hagg. Eccl. Rep. .....Haggard. Eccl.

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Hall & Tw. ..... Hall and Twells. Ch.
Hardr. ..... Hardres. Ex.
Hare ..... Hare. Ch.
Harr. & R. ..... Harrison and Rutherford. C. P.
Harr. & W. ..... Harrison and Wollaston. Bail Court.
Hawk. P. C. ..... Hawkins's Pleas of the Crown.
Hayes & J. ..... Hayes and Jones. Ex. (Ireland).
Hayes Exch. ..... Hayes. Ex. (Ireland).
H. Bl. ..... H. Blackstone. C. P.
Hem. & M. ..... Hemming and Miller. Ch.
H. L. Cas. ..... House of Lords Cases.
Hobart ..... Hobart. K. B.
Hodges. ..... Hodges. C. P.
Hog. ..... Hogan. Rolls (Ireland).
Holt ..... Holt. K. B.
Holt, Eq. ..... Holt. Eq.
Holt, N. P. ..... Holt. Nisi Prius.
Hopw. & C. ..... Hopwood and Coltman. Registration.
Hopw. & P. ..... Hopwood and Philbrick. Registration.
Horn & H. ..... Horn and Hurlstone. Ex.
Hurlst. & C. ..... Hurlstone and Coltman. Ex.
Hurlst. & N. ..... Hurlstone and Norman. Ex.
Hurlst. & W. ..... Hurlstone and Wamsley. Ex.

[1894] I. R. ..... Irish Law Reports (1894 onwards).
Ir. Ch. Rep. ..... Irish Chancery (1850–1866).
Ir. C. L. Rep. ..... Irish Com. Law (1850–1866).
Ir. Eq. Rep. ..... Irish Equity Reports.
Ir. Rep C. L. ..... Irish Com. Law (1866–1878).
Ir. Rep. Eq. ..... Irish Equity (1866–1878).

Jac. & W. ..... Jacob and Walker. Ch.
Jacob ..... Jacob. Ch.
Jebb & B. ..... Jebb & Bourke (Ireland).
Jebb & S. ..... Jebb & Symes (Ireland).
Jenkins ..... Jenkins. Ex.
J. Kelyng ..... Sir J. Kelyng. Crown Cases.
Johns. & H. ..... Johnson and Hemming. Ch.
Johns. Ch. ..... Johnson. Ch.
Jones ..... Jones. Ex. (Ireland).
Jones & C. ..... Jones and Carey. Ex. (Ireland).
Jones & L. ..... Jones and Latouche. Ch. (Ireland).
J. P. ..... The Justice of the Peace.
Jur. ..... The Jurist.

K. & F. N. S. W. ..... Knox & Fitzhardinge (New South Wales).
K. & G. ..... Keane and Grant. Registration.
Kay ..... Kay. Ch.
Kay & J. ..... Kay and Johnson. Ch.
[1901] K. B. ..... Law Reports Kings Bench (1901 onwards).

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Keble ..... Keble. K. B.
Keen ..... Keen. Rolls Court.
Keilw. ..... Keilway. K. B.
Kenyon ..... Kenyon. K. B.
Knapp & O. ..... Knapp and Ombler. Election.
Knapp P. C. C. ..... Knapp. P. C.
Knox, N. S. W. ..... Knox (New South Wales).

Latch ..... Latch. K. B.
Ld. Raym. ..... Lord Raymond. K. B.
Leach, C. L. ..... Leach. Crown Cases.
Leigh & C. C. C. ..... Leigh and Cave. Crown Cases.
Lev. ..... Levinz. K. B.
Lewin, C. C. ..... Lewin. Crown Cases.
L. G. R. ..... Local Government Reports.
Lit. Rep. ..... Littleton. C. P.
L. J. Ch. K. B. etc. ..... Law Journal Reports, 1822 to 1831.
L. J. Bkr. N. S. ..... Bankruptcy.
" Ch. N. S. ..... Chancery.
" C. P. N. S. ..... Common Pleas.
" Eccl. N. S. ..... Ecclesiastical.
" Exch. N. S. ..... Exchequer.
" Mag. Cas. N. S. ..... Magistrates' Cases.
" P. C. N. S. ..... Privy Council.
" Prob. N. S. ..... Probate and Matrimonial.
" Prob. N. S. ..... Probate, Divorce, and Admiralty.
" Prob. N. S. ..... Admiralty.
" Q. B. N. S. ..... Queen's Bench.
} From 1831 onwards.
Lloyd & Goold (t. Sugden) & (t. Plunket) ..... Lloyd and Goold. Ch. (Ireland).
Lofft ..... Lofft. K. B.
Longf. & T. ..... Longfield and Townsend. Ex. (Ireland).
Lower Can. Jur. ..... Lower Canada Jurist.
Lowndes & M. ..... Lowndes and Maxwell. Bail Court.
Lowndes, M. & P. ..... Lowndes, Maxwell and Pollock. Bail Court.
L. R. A. & E. .....
L. R. C. C. .....
L. R. Ch. .....
L. R. C. P. .....
L. R. Eq. .....
L. R. Exch. .....
L. R. H. L. .....
L. R. H. L. Sc. App. Cas. ..
L. R. P. & D. .....
L. R. P. C. .....
L. R. P. D. .....
L. R. Q. B. .....
} Law Reports, 1866 to 1875 inclusive.
L. R. Ir. ..... Irish Law Reports (1879–1893).
L. T. N. S. ..... Law Times. New Series.
Lush. ..... Lushington. Adm.
Lut. ..... Lutwyche. Registration.
Lutw. Reg. Cas. ..... Lutwyche. C. P.

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Macl. & R. ..... Maclean and Robinson. Scotch Appeals.
M'Clel. ..... M'Cleland. Ex.
M'Clel. & Y. ..... M'Cleland and Young. Ex.
Macn. & G. ..... Macnaghten and Gordon. Ch.
Macpherson ..... (Scotland).
Macq. H. L. Cas. ..... Macqueen. H. L. (Scotland).
Madd. Ch. ..... Maddock. Ch.
Manitoba L. Rep. ..... Manitoba Law Reports.
Mann. & G. ..... Manning and Granger. C. P.
Mann. & R. ..... Manning and Ryland. K. B.
Manson ..... Manson. Bky. and Winding-up.
Marsh. ..... Marshall. C. P.
Maule & S. ..... Maule and Selwyn. K. B.
Mees. & W. ..... Meeson and Welsby. Ex.
Meg. ..... Megone. Company Cases.
Meriv. ..... Merivale. Ch.
Mod. ..... Modern Reports.
Molloy ..... Molloy. Ch. (Ireland).
Montagu, Bankr. Cas. ..... Montagu. Bky.
Mont. & Ayr..... Montagu and Ayrton. Bky.
Mont. & B. Bankr. ..... Montagu and Bligh. Bky.
Mont. & C. Bankr. ..... Montagu and Chitty. Bky.
Mont. & M'Arth. Bankr. ... Montagu and M'Arthur. Bky.
Mont. D. & De G. ..... Montagu, Deacon and De Gex. Bky.
Montreal L. Rep. S. C. or Q. B. ..... Montreal Law Reports. Superior Court or Queen's Bench.
Moody & M. ..... Moody and Malkin. Nisi Prius.
Moody & R. ..... Moody and Robinson. Nisi Prius.
Moody C. C. ..... Moody. Crown Cases.
Moore ..... Moore. C. P.
Moore & P. ..... Moore and Payne. C. P.
Moore & S. ..... Moore and Scott. C. P.
Moore Ind. App. ..... Moore. Indian Appeals.
Moore, P. C. C. ..... Moore. P. C.
Morrell ..... Morrell. Bky.
Moseley ..... Moseley. Ch.
Murph. & H. ..... Murphy and Hurlstone. Ex.
Myl. & C. ..... Mylne and Craig. Ch.
Myl. & K. ..... Mylne and Keen. Ch.

N. B. ..... New Brunswick Reports.
N. B. Eq. Rep. ..... New Brunswick Equity Reports.
Nelson ..... Nelson. Ch.
Nev. & M. ..... Neville and Manning. K. B.
Nev. & P. ..... Neville and Perry. K. B.
Newfoundl. R. ..... Newfoundland Reports.
New Reports. ..... New Reports (1862–1865).
New Sess. Cas. ..... New Sessions Cases.
New S. Wales St. R. ..... New South Wales State Reports.
New Zeal. L. R. ..... New Zealand L. R.
Notes of Cases ..... Notes of Cases (England).

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N. S. ..... Nova Scotia Reports.
N. S. W. L. R. ..... New South Wales Law Reports.
Noy. ..... Eng. K. B.

O. B. & F. N. Z. ..... Ollivier, Bell & Fitzgerald (New Zealand).
O'M. & H. ..... O'Malley and Hardcastle. Election.
Ont. App. ..... Court of Appeal (Ontario).
Ont. App. Rep. ..... Appeal Reports (Ontario).
Ont. Elec. Cas. ..... Election Cases (Ontario).
Ont. L. Rep. ..... Ontario Law Reports (Current series).
Ont. Pr. Rep. ..... Practice Reports (Ontario).
Ont. Rep. ..... Ontario Reports.

[1891] P ..... Law Reports, Probate (1891 onwards).
P. D. ..... Law Reports, Probate Division (1876–1890).
Paton ..... H. L. Scotland.
Patterson sc. App. Cas. .... Scotland.
Peake, Add. Cas. ..... Peake. Additional Cases, Nisi Prius.
Peake, N. P. Cas. ..... Peake. Nisi Prius.
Perry & D. ..... Perry and Davison. K. B.
Perry & K. ..... Perry and Knapp. Election.
Phill Ch. ..... Phillips. Ch.
Phillim. Eccl. Rep. ..... Phillimore. Eccl.
Plowd. ..... Eng. K. B.
Pol. ..... Pollexfen. K. B.
Popham ..... Popham. K. B.
Prec. in Ch. ..... Precedents in Chancery.
Pr. Edw. Isl. ..... Prince Edward Island Reports.
Price ..... Price. Ex.
P. Wms. ..... Peere Williams. Ch.

Q. B. ..... Queen's Bench Reports (1841–1852).
[1891] Q. B. ..... Law Reports, Queen's Bench (1891 onwards).
Q. B. D. ..... Law Reports, Queen's Bench Division (1876–1890).
Quebec Pr. Rep. ..... Quebec Practice Reports.
Queensl. L. R. ..... Queensland Law Reports.
Queensl. St. R. ..... Queensland State Reports.
Que. K. B. ..... Quebec Reports, King's Bench.

Railway & C. Cas. ..... Railway and Canal Cases (1835–1854).
Railway & C. Traffic Cas. .. Rly. and Canal Cases (1874 onwards).
Rap. Jud. Quebec C. S. or B. R. Quebec Reports, Superior Courts.
Rep. in Ch. ..... Reports in Chancery.
Reports ..... The Reports, 1893–1895.
Revised Reports. ..... Revised Reports.
Rev. Legale L. C. ..... Revue Legale (Quebec).
Ridgw. L. & S. ..... Ridgway, Lapp & Schoales. K. B. (Ireland).
Ridgw. P. C. ..... Ridgeway. Parliamentary Cases.
Robertson ..... H. L. (Scotland).
Robinson ..... H. L. (Scotland).
5 B. R. C.

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Rolle Abr. ..... Rolle's Abridgment.
Rolle Rep. ..... Rolle. K. B.
Rose ..... Rose. Bky.
R. P. C. ..... Reports of Patent Cases.
Russ. & M. ..... Russell and Mylne. Ch.
Russ. & R. C. C. ..... Russell and Ryan. Crown Cases.
Russ. Ch. ..... Russell. Ch.
Russell (N. S.) ..... Russell's Equity Decisions (Nova Scotia).
Ryan & M. ..... Ryan and Moody. Nisi Prius.

Salk. ..... Salkeld. K. B.
Sask. L. R. ..... Saskatchewan Law Reports.
Sau. & Sc. ..... Sausse and Scully. Rolls Ct. (Ireland).
Saund. ..... Saunders. K. B.
S. Austr. L. R. ..... South Australian L. R.
Sayer ..... Sayer. K. B.
Sch. & Lef. ..... Schoales and Lefroy. Ch. (Ireland).
Scot. Jur. ..... Scottish Jurist.
Scot. L. T. ..... Scottish Law Times.
Scot. L. R. ..... Scottish Law Rep.
Scott ..... Scott. C. P.
Scott N. R. ..... Scott. New Reports, C. P.
Select Cas. Ch. ..... Select Cases in Chancery.
Selw. N. P. ..... Selwyn. Law of Nisi Prius.
Shaw ..... H. L. (Scotland).
Shaw & M. ..... H. L. (Scotland).
Shower ..... Shower. K. B.
Shower P. C. ..... Shower. Parliamentary.
Sid. ..... Siderfin. K. B.
Sim. ..... Simons. Ch.
Sim. & Stu. ..... Simons and Stuart. Ch.
Smale & G. ..... Smale and Giffard. Ch.
Smith ..... Smith. K. B.
Smith ..... Smith. Registration.
Sol. Jo. ..... Solicitor's Journal.
Spinks Eccl. & Adm. ..... Adm.
Starkie ..... Starkie. Nisi Prius.
State Tr. ..... State Trials.
Strange ..... Strange. K. B.
Styles ..... Styles. K. B.
Swabey, Adm. ..... Swabey. Adm.
Swabey & T. ..... Swabey and Tristram. Probate.
Swanst. ..... Swanston. Ch.

Tamlyn ..... Tamlyn. Rolls Court
T. & M. ..... Temple and Mew. Crown Cases.
Tasm. L. R. ..... Tasmanian L. R.
Taunt. ..... Taunton. C. P.
Term Rep. ..... Durnford and East. K. B.
Terr. L. Rep. ..... North-West Territories Reports.
Times L. R. ..... Times Law Reports.

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T. Jones ..... Sir T. Jones. K. B.
Tothill ..... Tothill. Ch.
T. Raym. ..... Sir T. Raymond. K. B.
Turn. & R. ..... Turner and Russell. Ch.
Tyrw. ..... Tyrwhitt. Ex.
Tyrw. & G. ..... Tyrwhitt and Granger. Ex.

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Pope, Re, 4 B. R. C. 775—s. c. [1908] 2 K. B. 169, 77 L. J. K. B. N. S. 767, 98 L. T. N. S. 775, 24 Times L. R. 556, 52 Sol. Jo. 458, 15 Manson, 201.
Porter v. Freudenberg, 5 B. R. C. 548—s. c. [1915] 1 K. B. 857, 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.
Powell & Thomas v. Evan Jones & Co. 3 B. R. C. 252—s. c. [1905] 1 K. B. 11, 21 Times L. R. 55, 74 L. J. K. B. N. S. 115, 53 Week. Rep. 277, 92 L. T. N. S. 430, 10 Com. Cas. 36.
Price, Re, 5 B. R. C. 529—s. c. [1905] 2 Ch. 55, 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44.
v. Newton. See Price, Re.
Prince v. Haworth, 2 B. R. C. 629—s. c. [1905] 2 K. B. 768, 92 L. T. N. S. 773, 21 Times L. R. 402, 75 L. J. K. B. N. S. 92, 54 Week. Rep. 249.
Pritchard, Jones v.
Prosser, Smith v.
5 B. R. C.
Provincial Bill Posting Co., Nussey v.
Queen. For Crown cases naming King, Queen, Rex or Reg. as a party, see R. v.
Quinn v. Leathem, 1 B. R. C. 197—s. c. [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749.
R. v. Brooks, 1 B. R. C. 725—s. c. 9 B. C. 13.
v. Cahill, 2 B. R. C. 465—s. c. 35 N. B. 240.
v. Daye, 3 B. R. C. 211—s. c. [1908] 2 K. B. 333, 77 L. J. K. B. N. S. 659, 72 J. P. 269, 99 L. T. N. S. 165.
v. Lewis, 1 B. R. C. 739—s. c. 6 Ont. L. Rep. 132.
v. Linneker, 3 B. R. C. 237—s. c. [1906] 2 K. B. 99, 75 L. J. K. B. N. S. 385, 70 J. P. 293, 54 Week. Rep. 494, 94 L. T. N. S. 856, 22 Times L. R. 495, 21 Cox, C. C. 196.
v. Louie, 2 B. R. C. 912—s. c. 10 B. C. 1.
v. Martin, 2 B. R. C. 336—s. c. 9 Ont. L. R. 218.
v. Murray, 3 B. R. C. 775—s. c. [1906] 2 K. B. 385, 75 L. J. K. B. N. S. 593, 70 J. P. 295, 95 L. T. N. S. 295, 22 Times L. R. 596.
Parker v.
v. Pickney, 4 B. R. C. 804—s. c. [1904] 2 K. B. 84, 73 L. J. K. B. N. S. 448, 68 J. P. 361, 52 Week. Rep. 513, 90 L. T. N. S. 468, 20 Times L. R. 363.
v. Plummer, 4 B. R. C. 917—s. c. [1902] 2 K. B. 339, 71 L. J. K. B. N. S. 805, 66 J. P. 647, 86 L. T. N. S. 836, 18 Times L. R. 659, 51 Week. Rep. 137, 20 Cox. C. C. 243.
v. Tibbits, 2 B. R. C. 469—s. c. [1902] 1 K. B. 77, 50 Week Rep. 125, 85 L. T. N. S. 521, 18 Times L. R. 49, 71 L. J. K. B. N. S. 4, 66 J. P. 4.
v. Tideswell, 1 B. R. C. 997—s. c. [1905] 2 K. B. 273, 74 L. J. K. B. N. S. 725, 69 J. P. 318, 93 L. T. N. S. 111, 21 Times L. R. 531, 21 Cox, C. C. 10.
v. Todd, 1 B. R. C. 883—s. c. 13 Manitoba L. Rep. 364.
Union Colliery Co. v.
West Rand Cent. Gold Min. Co. v.
Railway Co., Adderley v. [1905] 2 I. R. 378. See Adderley v. Great Northern R. Co.
v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426. See Taff Vale R. Co. v. Amalgamated Soc. of Ry. Servants.
v. Mukerjee, [1901] A. C. 396. See East Indian R. Co. v. Kalidas Mukerjee.

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Railway Co. v. Wright, [1901] 1 Ch. 738. See Midland R. Co. v. Wright.
Railway Servants v. Osborne, [1910] A. C. 87. See Amalgamated Soc. of Ry. Servants v. Osborne.
Ramsay & Co., Andrews v.
Read v. Friendly Soc. of Operative Stonemasons, 1 B. R. C. 503—s. c. [1902] 2 K. B. 732, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822.
Refuge Assur. Co., Kettlewell v.
Reg. See R. v.
Registered Trademark No. 37,760, Re, 1 B. R. C. 640—s. c. [1908] 1 Ch. 513, 77 L. J. Ch. N. S. 298, 98 L. T. N. S. 121, 25 R. P. C. 156.
Restell v. Nye, [1901] 1 K. B. 624. See Chambers v. Goldthorpe.
Rex. See R. v.
Reynolds v. Ashby & Son, 1 B. R. C. 653—s. c. [1904] A. C. 466, 73 L. J. K. B. N. S. 946, 20 Times L. R. 766, 53 Week. Rep. 129, 91 L. T. N. S. 607.
Richardson v. Graham, 1 B. R. C. 469—s. c. [1908] 1 K. B. 39, 77 L. J. K. B. N. S. 27, 98 L. T. N. S. 360.
Marreco v.
Richings, Lavell v.
Righton, Hadwell v.
Robbins, Re, 2 B. R. C. 903—s. c. [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755.
v. Legge. See Robbins, Re.
Robinson, Booth v.
Roby, Re, 4 B. R. C. 256—s. c. [1908] 1 Ch. 71, 77 L. J. Ch. N. S. 169, 97 L. T. N. S. 773.
Rochdale, Hartley v.
Roche v. M'Dermott, 1 B. R. C. 949—s. c. [1901] 1 I. R. 394.
Ronald v. Harper, 4 B. R. C. 972—s. c. [1913] Vict. L. R. 311.
Rosser & Sons, Devonald v.
Roumanian, The, 5 B. R. C. 937—s. c. [1916] A. C. 124.
Rubber Co. v. Martin, [1902] 1 K. B. 778. See Harburg Rubber Co. v. Martin.
Sadgrove v. Hole, 1 B. R. C. 459—s. c. [1901] 2 K. B. 1, 70 L. J. K. B. N. S. 455, 49 Week. Rep. 473, 84 L. T. N. S. 647, 17 Times L. R. 332.
Salaman, Re, 1 B. R. C. 587—s. c. [1908] 1 Ch. 4, 77 L. J. Ch. N. S. 60, 98 L. T. N. S. 255.
Salting, Commissioner of Stamp Duties v.
Salt Union v. Brunner, M. & Co. 5 B. R. C. 242—s. c. [1906] 2 K. B. 822, 22 Times L. R. 835, 76 L. J. K. B. N. S. 55, 95 Times L. R. 647.
Samuel & Rosenfeld, Kreglinger v.
Sandeman, C. & Co., Deverges v.
Sarpy v. Holland, 1 B. R. C. 769—s. c. [1908] 2 Ch. 198, 77 L. J. Ch. N. S. 637, 99 L. T. N. S. 317, 24 Times L. R. 600.
Sawdon & Co., Turner v.
Saxby v. Fulton, 4 B. R. C. 381—s. c. [1909] 2 K. B. 208, 78 L. J. K. B. N. S. 781, 101 L. T. N. S. 179, 25 Times L. R. 446, 53 Sol. Jo. 397.
Scarborough v. Cosgrove, 3 B. R. C. 305—s. c. [1905] 2 K. B. 805, 74 L. J. K. B. N. S. 892, 54 Week. Rep. 100, 93 L. T. N. S. 530, 21 Times L. R. 754.
Scarr v. General Acci. Assur. Corp. 2 B. R. C. 358—s. c. [1905] 1 K. B. 387, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173.
Scott, Re, 5 B. R. C. 840—s. c. [1901] 1 Q. B. 228, 70 L. J. Q. B. N. S. 66, 65 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148.
v. Coulson, 5 B. R. C. 792—s. c. [1903] 2 Ch. 249, 72 L. J. Ch. N. S. 600, 19 Times L. R. 440.
Sheffield v. Barclay, 2 B. R. C. 514—s. c. [1905] A. C. 392, 74 L. J. K. B. N. S. 747, 69 J. P. 385, 54 Week. Rep. 49, 93 L. T. N. S. 83, 21 Times L. R. 642, 10 Com. Cas. 287, 12 Manson, 248, 3 L. G. R. 992.
Shillito v. Biggart, 4 B. R. C. 532—s. c. [1903] 1 K. B. 683, 72 L. J. K. B. N. S. 294, 51 Week. Rep. 479, 88 L. T. N. S. 426, 19 Times L. R. 313, 8 Com. Cas. 137, 9 Asp. Mar. L. Cas. 396.
Shirt v. Calico Printers' Asso. 3 B. R. C. 62—s. c. [1909] 2 K. B. 51, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430.
Singleton, Brinklow v.
Skirrow, Dibden v.
Smith v. Giddy, 2 B. R. C. 897—s. c. [1904] 2 K. B. 448, 73 L. J. K. B. N. S. 894, 91 L. T. N. S. 296, 20 Times L. R. 596, 53 Week. Rep. 207.
v. Prosser, 5 B. R. C. 682—s. c. [1907] 2 K. B. 735, 97 L. T. N. S. 155, 23 Times L. R. 597.
Snell, Baker v.
Solicitor to the Treasury, Dixon v.
Sonnenthal, De Pass v.
South Wales Miners' Federation v. Glamorgan Coal Co. 1 B. R. C. 1—s. c. [1905] A. C. 239, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441.
Sterious & Co., Taddy & Co. v.

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Stevens v. Theatres, 2 B. R. C. 833—s. c. [1903] 1 Ch. 857, 72 L. J. Ch. N. S. 764, 51 Week. Rep. 585, 88 L. T. N. S. 458, 19 Times L. R. 334.
Stone, Aplin v.
Stuart v. Freeman, 2 B. R. C. 183—s. c. [1903] 1 K. B. 47, 72 L. J. K. B. N. S. 1, 51 Week. Rep. 211, 87 L. T. N. S. 516, 19 Times L. R. 24.
Stucley, Re, 3 B. R. C. 807—s. c. [1906] 1 Ch. 67, 75 L. J. Ch. N. S. 58, 54 Week. Rep. 256, 93 L. T. N. S. 718, 22 Times L. R. 33.
v. **Kekewich**, [1906] 1 Ch. 67. See Stucley, Re.
Sullivan v. Creed, 2 B. R. C. 139—s. c. [1904] 2 I. R. 317.
Crowder-Jones v.
Swain, Re, 2 B. R. C. 872—s. c. [1905] 1 Ch. 669, 74 L. J. Ch. N. S. 354, 92 L. T. N. S. 715.
Sweet, Fraser v.
Taddy & Co. v. Sterious & Co. 3 B. R. C. 286—s. c. [1904] 1 Ch. 354, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102.
Taff Vale R. Co. v. Amalgamated Soc. of Ry. Servants, 1 B. R. C. 832—s. c. [1901] A. C. 426, 70 L. J. K. B. N. S. 905, 65 J. P. 596, 50 Week. Rep. 44, 85 L. T. N. S. 147, 17 Times L. R. 698.
Tankerville, Jones & Sons v.
Tate v. Fullbrook, 2 B. R. C. 93—s. c. [1908] 1 K. B. 821, 77 L. J. K. B. N. S. 577, 98 L. T. N. S. 706, 24 Times L. R. 347, 52 Sol. Jo. 279.
Taylor, Kish v.
Telegraph Co. v. Cape Town Tramways Companies, [1902] A. C. 381. See Eastern & South African Teleg. Co. v. Cape Town Tramways Cos.
Tenby v. Mason, [1908] 1 Ch. 457. See Mayor, Aldermen and Burgesses of Tenby v. Mason.
Terry, Yates v.
Theatres, Stevens v.
Thomas, Williams v.
Thompson, Corbin v.
v. **Equity Fire Ins. Co. 3 B. R. C. 1**—s. c. [1910] A. C. 592, 80 L. J. P. C. N. S. 13, 103 L. T. N. S. 153, 26 Times L. R. 616.
Thorley v. Orchis S. S. Co. 2 B. R. C. 565—s. c. [1907] 1 K. B. 660, 76 L. J. K. B. N. S. 595, 96 L. T. N. S. 488, 23 Times L. R. 338, 12 Com. Cas. 251.
Thurston & Co., Bailey v.
Tibbits, R. v.
Tideswell, R. v.
Tilling, Continental Tyre & R. Co. v.
5 B. R. C.
Tobakin v. Dublin Southern Dist. Tramways Co. 3 B. R. C. 926—s. c. [1905] 2 I. R. 58.
Todd, R. v.
Toronto Electric L. Co., Gloster v.
Torrens v. Walker, 3 B. R. C. 343—s. c. [1906] 2 Ch. 166, 75 L. J. Ch. N. S. 645, 54 Week. Rep. 584, 95 L. T. N. S. 409.
Treasury Solicitor, Dixon v. See Dixon v. Solicitor to the Treasury.
Tunnicliffe & Hampson, West Leigh Colliery Co. v.
Turner v. Sawdon & Co. 2 B. R. C. 751—s. c. [1901] 2 K. B. 653, 70 L. J. K. B. N. S. 897, 49 Week. Rep. 712, 85 L. T. N. S. 222, 17 Times L. R. 645.
Umphelby, Douglas-Menzies v.
Union Colliery Co. v. R. 2 B. R. C. 222—s. c. 31 Can. S. C. 81.
Usborne, Economic L. Assur. Soc. v.
Valley Printing Co., Mansell v.
Victoria-Montreal F. Ins. Co., Home Ins. Co. v.
Villar v. Gilbey, 1 B. R. C. 568—s. c. [1907] A. C. 139, 76 L. J. Ch. N. S. 339, 96 L. T. N. S. 511, 23 Times L. R. 392.
Wagstaff, Re, 4 B. R. C. 50—s. c. [1908] 1 Ch. 162, 77 L. J. Ch. N. S. 190, 98 L. T. N. S. 149, 24 Times L. R. 134.
v. **Jalland**, [1908] 1 Ch. 162. See Wagstaff, Re.
Walker, Re, 4 B. R. C. 432—s. c. [1905] 1 Ch. 160, 74 L. J. Ch. N. S. 86, 53 Week. Rep. 177, 91 L. T. N. S. 713.
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Walmesley, Mellor v.
Walter v. Ashton, 5 B. R. C. 338—s. c. [1902] 2 Ch. 282, 71 L. J. Ch. N. S. 839, 18 Times L. R. 445, 51 Week. Rep. 131.
v. **Lane, 2 B. R. C. 312**—s. c. [1900] A. C. 539, 69 L. J. Ch. N. S. 699, 49 Week. Rep. 95, 83 L. T. N. S. 289, 16 Times L. R. 551.
Ward, Jackson v.
Warwick Deeping, Ex parte, [1907] 2 K. B. 33. See Grant Richards, Re.
Watson v. Jones, [1905] A. C. 480. See Watson v. M'Ewan.
v. **M'Ewan, 4 B. R. C. 934**—s. c. [1905] A. C. 480, 74 L. J. P. C. N. S. 151, 93 L. T. N. S. 489.
Watson & Sons, Jackson v.
Webb, Bevan v.
v. **Derbyshire.** See Derbyshire, Re.
Howatson v.
Wedmore, Re, 2 B. R. C. 502—s. c. [1907] 2 Ch. 277, 76 L. J. Ch. N. S. 486, 97 L. T. N. S. 26, 23 Times L. R. 547.

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Wedmore v. Wedmore. See Wedmore, Re.
West v. Bristol Tramways Co. 4 B. R. C. 243—s. c. [1908] 2 K. B. 14, 77 L. J. K. B. N. S. 684, 72 J. P. 243, 99 L. T. N. S. 264, 24 Times L. R. 478, 52 Sol. Jo. 393, 6 L. G. R. 609.
Western Morning News Co., McQuire v.
West Leigh Colliery Co. v. Tunnicliffe & Hampson, 5 B. R. C. 916—s. c. [1908] App. Cas. 27, 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146.
Westminster, Chaplin & Co. v.
West Rand Cent. Gold Min. Co. v. R. 5 B. R. C. 885—s. c. [1905] 2 K. B. 391, 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.
W. H. Chaplin & Co. v. Westminster, [1901] 2 Ch. 329. See Chaplin & Co. v. Westminster.
Wheeler, Herdman v.
Whight, Boosey v.
White, White v.
v. White, 3 B. R. C. 552—s. c. [1906] A. C. 72, 85 L. J. P. C. N. S. 14, 94 L. T. N. S. 64.
Whitford v. Corkum. See Conrad v. Corkum.
Whiting v. De Rutzen, [1905] 1 Ch. 96. See Whiting's Settlement, Re.
Whitings' Settlement, Re, 4 B. R. C. 10—s. c. [1905] 1 Ch. 96, 21 Times L. R. 83.
Widgeon, Heath v.
Williams v. Thomas, 3 B. R. C. 929—s. c. [1909] 1 Ch. 713, 78 L. J. Ch. N. S. 473, 100 L. T. N. S. 630.
Willis v. Young, 3 B. R. C. 976—s. c. [1907] 1 K. B. 448, 76 L. J. K. B. N. S. 390, 71 J. P. 6, 96 L. T. N. S. 155, 23 Times L. R. 23.
Wilmer's Trusts, Re, 4 B. R. C. 479—s. c. [1903] 2 Ch. 411, 72 L. J. Ch. N. S. 670, 89 L. T. N. S. 148.
Wilson v. Carnley, 1 B. R. C. 901—s. c. [1908] 1 K. B. 729, 77 L. J. K. B. N. S. 594, 98 L. T. N. S. 265, 24 Times L. R. 277, 52 Sol. Jo. 239.
Wing v. London General Omnibus Co. 3 B. R. C. 79—s. c. [1909] 2 K. B. 652, 78 L. J. K. B. N. S. 1063, 101 L. T. N. S. 411, 73 J. P. 429, 25 Times L. R. 729, 53 Sol. Jo. 713, 7 L. G. R. 1093.
Wingfield, Moore v.
Wingrove, Garner v.
Winkfield, The, 3 B. R. C. 368—s. c. [1902] P. 42, 71 L. J. Prob. N. S. 21, 50 Week. Rep. 246, 85 L. T. N. S. 688, 18 Times L. R. 178, 9 Asp. Mar. L. Cas. 259.
Wise v. Perpetual Trustee Co. 5 B. R. C. 752—s. c. [1903] A. C. 139, 72 L. J. P. C. N. S. 31, 51 Week. Rep. 241, 87 L. T. N. S. 569, 19 Times L. R. 125.
Woolston, The. See Odesso, The.
Worthington Corp. v. Heather, 4 B. R. C. 280—s. c. [1906] 2 Ch. 532, 75 L. J. Ch. N. S. 761, 22 Times L. R. 750, 4 L. G. R. 1179, 95 L. T. N. S. 718.
Wright v. Anderton, 4 B. R. C. 425—s. c. [1909] 1 K. B. 209, 78 L. J. K. B. N. S. 165, 100 L. T. N. S. 123, 25 Times L. R. 156, 53 Sol. Jo. 135.
Midland R. Co. v.
Percival v.
Wrigley v. Gill, 4 B. R. C. 814—s. c. [1906] 1 Ch. 165, 75 L. J. Ch. N. S. 210, 54 Week. Rep. 274, 94 L. T. N. S. 174.
Yangtsze Ins. Asso. v. Indemnity Mut. M. Assur. Co. 5 B. R. C. 53—s. c. [1908] 2 K. B. 504, 77 L. J. K. B. N. S. 995, 99 L. T. N. S. 498, 24 Times L. R. 687, 52 Sol. Jo. 550, 13 Com. Cas. 283.
Yates v. Terry, 5 B. R. C. 446—s. c. [1902] 1 K. B. 527, 71 L. J. K. B. N. S. 282, 50 Week. Rep. 293, 86 L. T. N. S. 133, 18 Times L. R. 262.
Yorkshire Miners' Asso., Denaby & C. Main Collieries v.
Young, Willis v.

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British Ruling Cases

[ENGLISH DIVISIONAL COURT.]

NICKELS & COMPANY *v.* LONDON & PROVINCIAL MARINE & GENERAL INSURANCE COMPANY.

70 L. J. Q. B. N. S. 29.
Also Reported in 17 Times L. R. 54, 6 Com. Cas. 15.

Insurance against "all consequences of hostilities or warlike operations" — Blockade of port of destination — Ship returning to port of loading — Liability of insurer for expenses.

The plaintiffs effected with the defendants a policy upon 810 bags of rice by a vessel named from Liverpool to any port in Cuba. The policy was expressed to be against "all consequences of . . . hostilities or warlike operations." The vessel sailed from Liverpool for Havana, and in the course of the voyage war was declared and hostilities began between the United States and Spain, and Havana was blockaded. On learning this at a port of call, the master, under powers conferred upon him by the bill of lading, refused to proceed with the voyage, and returned to Liverpool. The plaintiffs paid the freight and incurred certain other expenses:—*Held*, that the defendants were not liable upon the policy, as the plaintiffs' loss was due, not to the consequences of hostilities, but to a proper exercise by the master of his discretion under the bill of lading.

(November 16, 1900.)

ACTION tried before Mathew, J.

The action was brought by the plaintiffs to recover a sum of

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53£ 3*s.* 9*d.* under a policy of marine insurance upon 810 bags of rice.

The plaintiffs shipped the rice on board the Spanish ship Serra under a bill of lading from Liverpool to Havana. The bill of lading contained a clause: "In case of war, blockade . . . or other cause which may prevent the vessel entering the port to which she is bound, or that as a consequence of such or similar events the captain shall not consider it prudent to enter the said port . . . the goods shall be delivered to the consignee, or failing same deposited at the nearest port which will admit them and which the captain may consider convenient. . . . The delivery effected by the captain at the nearest port that may receive the goods shall be considered as final delivery, the [30] whole of the freight being considered earned."

On April 13, 1898, the plaintiffs effected a policy on the rice with the defendants by the steamship Serra "from Liverpool or Birkenhead to all or any port or ports, place or places, of call $\frac{\text{and}}{\text{or}}$ discharge in Cuba with liberty to call at Canary Islands."

The policy was only against risks excluded by the free of capture and seizure clause. The excluded risks were specified in a slip attached to the policy: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

In April, 1898, the ship sailed from Liverpool for Havana with the cargo of rice. Shortly afterwards war was declared and hostilities began between the United States and Spain, and Havana was blockaded by the fleet of the United States. The vessel called at Las Palmas, in the Canary Islands, and the master, having heard of what had taken place, refused to proceed with the voyage to Havana, and took the vessel back to Liverpool. The rice was there discharged, some of it being sold, and some stored.

The plaintiffs' claim in respect of the freight which they had to pay, and expenses in connection with the discharge and warehousing of the rice.

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J. D. Crawford, for the plaintiffs. The question is whether the loss was caused by hostilities or the consequences of hostilities. The loss was as much due to the hostilities as if the vessel had been pursued by a cruiser and had been lost in evading the pursuit; or as if, with the object of evading pursuit, she had taken refuge in a place where there was little protection and had been lost in consequence. She only returned to Liverpool in order to avoid the risk of capture, which she would have incurred if she had pursued her voyage to Havana.

[He referred to *O'Reilly* v. *Gonne* [1815] 4 Campb. 249, 16 Revised Rep. 788; *O'Reilly* v. *Royal Exchange Assurance* [1815] 4 Campb. 246, 16 Revised Rep. 786, and the judgment of Wills, J., in *Isitt* v. *Railway Passengers Assurance Co.* [1889] 22 Q. B. D. 504, 60 L. T. N. S. 297, 37 Week. Rep. 477, 58 L. J. Q. B. N. S. 191.]

J. A. Hamilton, for the defendants. The loss in the present case was not a proximate consequence of any peril insured against. The goods were never out of the control of the carriers, as was the case in *Rodocanachi* v. *Elliott* (1873) L. R. 8 C. P. 649, 42 L. J. C. P. N. S. 247. The cases of *Blackenhagen* v. *London Assurance Co.* (1808) 1 Campb. 454, 10 Revised Rep. 729, 13 Eng. Rul. Cas. 650, and *Hadkinson* v. *Robinson* (1803) 3 Bos. & P. 388, 7 Revised Rep. 786, shew that where an embargo or fear of captures obliges a vessel to turn back, and loss follows, the loss is not directly caused by the perils insured against, although the fear may be perfectly reasonable. In the present case the hostilities were not the *causa proxima* of the loss.

[He also cited *Ionides* v. *Universal Marine Insurance Company* [1863] 14 C. B. N. S. 259, 32 L. J. C. P. N. S. 170, 10 Jur. N. S. 18, 8 L. T. N. S. 705, 11 Week. Rep. 858, 14 Eng. Rul. Cas. 271, and *Pink* v. *Fleming* [1890] 25 Q. B. D. 396, 59 L. J. Q. B. N. S. 559, 63 L. T. N. S. 413, 6 Asp. Mar. L. Cas. 554.]

J. D. Crawford replied.

Mathew, J.: I am of opinion that there has been no loss under the policy. There was no capture or seizure, and no attempt to capture or seize within the first part of the clause in

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the policy. But the clause goes on: "And also from all consequences of riots, civil commotions, hostilities, or warlike operations." The vessel did not in fact encounter any direct hostilities, but it is sought to fix upon the underwriters a loss due to an indirect consequence thereof. The vessel sailed from the Mersey, and put into Las Palmas after war had broken out. Under the bill of lading the master was entitled to go back to Liverpool, and he went back, and claimed and was paid freight. The loss so incurred was clearly not a consequence of hostilities, but was due to the terms of the bill of lading. It seems to me that the loss was a consequence from the proper exercise by the master of his discretion under the bill of lading. The policy was not a policy against fear [31] of capture or seizure. My judgment must be for the defendants.

Judgment accordingly.

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I. Scope.

The general topic stated as the title of this note is, so far as it comprehends the construction of insurance against capture, or of a "warranted free from capture" clause in a policy of marine insurance, covered by the note to *Andersen* v. *Marten, post,* 66, which should be consulted in this connection.

As to the effect of carriage of contraband upon marine insurance, see note to *Yangtsze Ins. Asso.* v. *Indemnity Mut. M. Assur. Co. post,* 53.

As to the validity of insurance of enemy property against seizure, see note to *Janson* v. *Driefontein Consol. Mines, post,* 810.

II. War risks; when covered.

Insurance against "the risk contained in all regular policies of insurance" covers loss by capture; and considerations drawn from the amount of the premium, or a letter written by the assured with a view to obtain indemnity from another quarter, in which the policy is spoken of as protecting the assured against sea risks only, are not available to vary its meaning. *Levy* v. *Merrill* (1826) 4 Me. 180.

A general policy unaccompanied with any warranty covers war risks of all kinds and of all countries (*Barnewall* v. *Church* (1803) 1 Caines, 217, 2 Am. Dec. 180), belligerent as well as neutral property (*Hodgson* v. *Marine Ins. Co.* (1809) 5 Cranch, 100, 3 L. ed. 48; *Murray* v. *United Ins. Co.* (1801) 2 Johns. Cas. 263; *Elting* v. *Scott* (1807) 2 Johns. 157; *Straas* v. *Marine Ins. Co.* (1806) 1 Cranch, C. C. 343, Fed. Cas. No. 13,518); so, a policy "for whom it may concern" will, in ordinary cases, cover belligerent property (*Buck* v. *Chesapeake Ins. Co.* (1828) 1 Pet. 151, 7 L. ed. 90). But see, *contra,* cases set forth *infra,* under heading, "Matters as to which a duty of disclosure exists," which hold that where the ownership or origin of property is such as to expose it to capture or condemnation, a failure to disclose the circumstances to the insurer will avoid the policy.

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The general terms of insurance against capture are, however, to be understood as virtually containing an exception of such captures as may be made by the authority of the government of the insurers (*Furtado* v. *Rogers* [1802] 3 Bos. & P. 191, 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125; *Kellner* v. *Le Mesurier* (1803) 4 East, 396, 1 Smith, 72, 7 Revised Rep. 581; *Gamba* v. *Le Mesurier* (1803) 4 East, 407, 7 Revised Rep. 590; *Ex parte Lee* [1806] 13 Ves. Jr. 64), or by a cobelligerent (*Brandon* v. *Curling* (1803) 4 East, 410, 1 Smith, 85, 7 Revised Rep. 592), as a contract to indemnify against such capture is regarded as contrary to public policy.

Where neither vessel nor cargo is warranted neutral, the insurer of cargo is liable for its loss by condemnation as being contraband of war (*Baltimore Ins. Co.* v. *Taylor* (1810) 3 Harr. & J. 198); and neither the fact that a vessel was laden with munitions of war destined for a belligerent, nor that the ship itself was to be offered for sale to the belligerent, nor that its captain was to be employed in the naval service of the belligerent, nor that a breach of blockade was committed by the vessel, violates a policy of insurance covering all risks, especially where the practices of chartering neutral vessels for the transportation of military stores and troops, and of such vessels being sold for the purpose of being used as war vessels, are facts of universal notoriety in the commercial world at the time of the insurance (*Maryland & P. Ins. Co.* v. *Bathurst* (1833) 5 Gill & J. 159). As to the validity of insurance upon contraband goods or voyages, see note to *Yangtsze Ins. Asso.* v. *Indemnity Mut. M. Assur. Co. post*, 53.

The fact that goods are shipped in the name of the insurer to protect them from seizure by enemies of the country of the insured does not render the policy void. *Levy* v. *Merrill* (1826) 4 Me. 180.

If, after the commencement of the voyage insured, a war breaks out between the country to which the property belongs and a foreign country, the policy is not vacated, and the insurers are liable for the loss arising out of the state of war. *Saltus* v. *United Ins. Co.* (1818) 15 Johns. 523.

Where insurance is made before the commencement of hostilities but when everybody expects war immediately, the insured is not bound to give the underwriter notice, though the ship does not sail until after the war takes place, since, although the risk has increased since the taking out of the policy, it was in view when the policy was written. *Planche* v. *Fletcher* (1779) 1 Dougl. K. B. 251.

But, in order to render an insurer against the consequences of hostilities liable, it is essential that the policy shall have attached. Thus, the insurer of a cargo against capture is not responsible for loss arising from a resale of the cargo at the port of loading, even though the underwriters notified the assured that if the cargo was

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sent they would take the position that the assured deliberately caused any loss occasioned by the perils insured against, since, the vessel not having set out to sea with the cargo, the risk insured against has never begun to operate. *Kacianoff* v. *China Traders' Ins. Co.* [1914] 3 K. B. 1121, 83 L. J. K. B. N. S. 1393, 111 L. T. N. S. 404, 30 Times L. R. 546, 19 Com. Cas. 371.

A policy against war risks only extends to any seizure by any country at war, made in a hostile manner, even though such seizure may subsequently, in a prize court, be declared contrary to the laws of war, and even though the prize court may direct restoration of the goods with costs and damages. *Seymour* v. *London & P. M. Ins. Co.* (1872) 1 Asp. Mar. L. Cas. 423, 41 L. J. C. P. N. S. 193, 27 L. T. N. S. 417; and see also, as holding that as between the insurer and the insured it is immaterial whether the capture is in accordance with the laws of nations or not, *Mauran* v. *Alliance Ins. Co.* (1867) 6 Wall. 1, 18 L. ed. 836; *Kohne* v. *Insurance Co. of N. A.* (1814) 6 Binn. 219.

III. Meaning of terms employed in insuring against war risks.

As to the signification of the word "capture" as used in policies of marine insurance, see note to *Andersen* v. *Marten, post,* 66.

In *Thompson* v. *Read* (1820) 12 Serg. & R. 440, it is said that there seems to be a difference between arrest, restraint, and detainment. "An arrest operates immediately on the subject arrested, so does a detainment; for it supposes the subject detained to be in the hands of the detainer; but there may be a restraint where the subject restrained is not in the hands of the restrainer. Capture includes an arrest; capture, strictly speaking, is generally made for the purpose of condemnation; but neutrals are often arrested and carried into port for the purpose of investigation. An embargo is a detainment as well as a restraint; but a blockade may be a restraint without arrest or detainment."

The fact that the word "restraint" is used in context between the words "arrest" and "detainment" in a policy of insurance against arrests, restraints, and detainments of all kings, princes, and people of what nation soever, does not imply that force must be used or threatened. If the restraint is imposed by political or executive act it is not the less a restraint, within the terms of the policy, because the master submits without opposition and without the presence of either actual or threatened force. *British & Foreign Marine Ins. Co.* v. *Sanday* (1916) 32 Times L. R. 266. Upon this point it was said by Lord Wrenbury: "It is not necessary that force should be employed, or even that force should be immediately available for employment. Every state ultimately enforces obedience to its laws by force. Restraint is equally imposed when obedience is given by rea-

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son of the existence of force in reserve, as when it is given by reason of force employed."

In *Ionides* v. *Universal M. Ins. Co.* (1863) 14 C. B. N. S. 259, Erle, Ch. J., in discussing the meaning of the term "consequences of hostilities," said: "Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore and the ship was lost: there the loss would be a loss by the consequences of hostilities within the terms of this exception. Or, suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbor nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost; that again would be a loss resulting from an attempt at capture, and would be within the exception. But I will suppose a third case,—the ship chased into a bay where she is unable to anchor or to make any harbor, and getting out again on a change of wind, but in pursuing her voyage encountering a storm which but for the delay she would have escaped, and being overwhelmed and lost: there, although it may be said that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the proximate cause of loss would be the perils of the sea, and not the attempt at seizure. Take another instance. The warranty extends to loss from all the consequences of hostilities. Assume that the vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel in ignorance of the fact enters this channel, and his ship is blown up; in that case the proximate cause of the loss would clearly be the consequences of hostilities, and so within the exception. But, suppose the master, being aware of the danger presented in the one channel, and, in order to avoid it, attempts to make the port by the other, and by unskilful navigation runs aground and is lost,—in my opinion that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy."

The forces of a rebel government may be considered as enemies within the meaning of a policy of marine insurance against acts of enemies. *Monongahela Ins. Co.* v. *Chester* (1862) 43 Pa. 491; and see also in this connection cases cited in the note to *Andersen* v. *Marten, supra,* under heading, "What constitutes a capture within terms of insurance or warranty."

Insurance on a vessel expressed as being "only to cover those risks excluded by the 'warranted free of capture, seizure, or detention' clause in marine policy or policies" must be construed as referring to marine policies generally, and not merely other marine policies in-

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suring the vessel for the same voyage. *Northwestern S. S. Co.* v. *Maritime Ins. Co.* (1908) 161 Fed. 166.

Where an insurer against war risks expressly stipulates in the policy that the assured shall be "at liberty to run blockades," he will be taken to have consented to whatever acts are usually done in such undertakings, including the carrying by the vessel of false clearance papers. *Maritime Ins. Co.* v. *M. S. Dollar S. S. Co.* (1910) 100 C. C. A. 547, 177 Fed. 127.

IV. Matters as to which a duty of disclosure exists.

As to the duty of disclosing to the insurer that the vessel insured is engaged in carrying contraband of war, or that the goods insured are contraband, see note to *Yangtsze Ins. Asso.* v. *Indemnity Mut. M. Assur. Co. post,* 53.

It has been held that there is no obligation to disclose the nationality of a vessel, there being no representation or warranty required respecting it by the policy. *West* v. *Seaman* (1885) Cassel's Dig. (Can.) 388; and see also cases cited under heading, "War risks—when covered," supra, to the effect that in the absence of a warranty or representation of neutral ownership, a general policy of insurance covers belligerent as well as neutral property. These cases appear to impose the duty of inquiry upon the insurer; while the following impose the duty of volunteering information upon the assured:

Thus, it has been held that nondisclosure to the insurer that the property insured belongs to persons established and carrying on trade in a belligerent country is so obviously material to the risk as to avoid the policy (*Bauduy* v. *Union Ins. Co.* (1809) 2 Wash. C. C. 391, Fed. Cas. No. 1,112); and that it is the duty of the insured to disclose to the insurer the origin of the cargo, where it is such as to expose it to capture (*Kohne* v. *Insurance Co. of N. A.* (1814) 6 Binn. 219). So, in *Union Ins. Co.* v. *Stoney* (1824) Harp. L. 235, it was held that an omission to disclose to an insurer of a vessel "at and from Charleston to Marseilles," and on cargo "from the loading thereof at Charleston," the fact that the vessel had been laden at Havana and had touched at Charleston without landing the goods, and the fact that the manifest showed that they were shipped in the names of Spaniards, was, where the fact that the cargo was Spanish property exposed it to the risk of capture and detention, a circumstance vitiating the policy.

Where the insurance is of the freight only of the neutral vessel, it is not a necessary inference, nor is there any implied engagement, that the cargo carried in her shall be neutral, for a neutral vessel may be lawfully employed in carrying a cargo which is the property of a belligerent. But when the insured has had intelligence which shows the risk to be under circumstances the most unfavorable to

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underwriters, and at the time the policy is effected it is known to the insured that his vessel is employed in carrying a cargo which is not neutral property, and especially if it is not known that the master or supercargo in charge of the vessel has undertaken to disguise the national character of the cargo by false papers, intelligence of this nature certainly ought to be disclosed. *Stocker* v. *Merrimack M. & F. Ins. Co.* (1810) 6 Mass. 220.

If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the nondisclosure of the fact that they would be on board will vacate the policy. *Livingston* v. *Maryland Ins. Co.* (1810) 6 Cranch, 274, 3 L. ed. 222, s. c. on subsequent appeal, 7 Cranch, 506, 3 L. ed. 421.

Where a policy of marine insurance is broad enough to cover war risks of all kinds, a false clearance is immaterial and need not be disclosed. *Barnewall* v. *Church* (1803) 1 Caines, 217, 2 Am. Dec. 180.

The presence on board a vessel of a false certificate of origin of the cargo need not be disclosed to the insurer, where it is found by the jury that such a certificate was the usual and customary document on board of American vessels bound for certain foreign ports, and one required by the decrees of those countries to insure an entry. *Le Roy* v. *United Ins. Co.* (1807) 7 Johns. 343.

The insured is not bound to disclose an apprehension of capture unless it is so certain as to be likely to increase the risk. *Marsh* v. *Muir* (1802) 1 Brev. (S. C.) 134, 2 Am. Dec. 648.

If according to long-established adjudications of the belligerent courts, generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the insured, should be disclosed. *Marshall* v. *Union Ins. Co.* (1809) 2 Wash. C. C. 357, Fed. Cas. No. 9,133.

V. Liability of insurer as affected by warranties.

As to the effect of a warranty against contraband or illicit trade, see note to *Yangtsze Ins. Asso.* v. *Indemnity Mut. M. Assur. Co. post,* 53.

a. Of seaworthiness.

It has been held that a neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality (*Steel* v. *Lacy* (1810) 3 Taunt. 285, 12 Revised Rep. 658); but in *Elting* v. *Scott* (1807) 2 Johns. 157, Kent, Ch. J., expressed a doubt whether it is a part of the implied warranty of seaworthiness that a vessel shall have her proper documents on board, and said that these docu-

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ments are only material when the national character of the vessel is warranted or represented.

b. Of nationality or neutrality.

Since, as above pointed out, the preponderance of opinion is to the effect that an insurer is, in the absence of any qualification of his liability, deemed to have assumed the risks arising from ownership of the insured property by a subject of a belligerent nation, it is customary, in time of war, at least, to introduce into the policy a warranty of neutrality, or, what amounts to the same thing where the assured is of a neutral nation, a warranty of nationality.

A warranty of nationality or neutrality is not equivalent to a mere exception of the risk of capture, but is a warranty in the proper sense of the term, so that its falsity will vitiate the contract, though the loss happens in a mode not affected by that falsity. *Woolmer* v. *Muilman* (1764) 1 W. Bl. 427, 3 Burr. 1419; *Rich* v. *Parker* (1798) 7 T. R. 705, 4 Revised Rep. 552, 14 Eng. Rul. Cas. 149.

The description of a vessel as being of a certain nationality is an implied warranty thereof where nationality is material to the risk (*Goix* v. *Low* (1800) 1 Johns. Cas. 341, reversed on another point in 2 Johns. Cas. 480; *Murray* v. *United Ins. Co.* [1801] 2 Johns. Cas. 168; *Higgins* v. *Livermore* [1817] 14 Mass. 106; *Atherton* v. *Brown* [1817] 14 Mass. 152; *Lewis* v. *Thatcher* [1819] 15 Mass. 431; *Barker* v. *Phœnix Ins. Co.* [1811] 8 Johns. 307, 5 Am. Dec. 339); and the insured may not show that the underwriters were informed at the time of their subscription, of the true nationality of the vessel, and that the ostensible nationality was assumed to avoid capture (*Atherton* v. *Brown, supra*). So, a representation in the body of the policy stating the goods insured to belong to American citizens amounts to an express warranty that the goods are neutral property at the time of the contract. *Walton* v. *Bethune* (1811) 2 Brev. 453, 4 Am. Dec. 597. But insuring a ship by an English name does not amount to a warranty or a representation that she is an English ship. If the premium is governed by the ship's nationality, the underwriters must ask for information, and not trust to the name. *Clapham* v. *Cologan* (1813) 3 Campb. 382.

An indorsement on the order of insurance that "although our advices gives us no reason to believe there will be any articles contraband of war on board the ship Budget, still, as we wish to be covered against all possible risk, we request your reconsideration of the written application including articles contraband of war," is not equivalent to a warranty of neutrality. *Maryland & P. Ins. Co.* v. *Bathurst* (1833) 5 Gill & J. 159.

A warranty of neutrality in strict construction only imports that

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the property belongs to a neutral person, but has been extended so as to require that the vessel shall be furnished with all those documents which are the proof of neutrality (*Wilcocks* v. *Union Ins. Co.* [1809] 2 Binn. 574, 4 Am. Dec. 480; *Blagge* v. *New York Ins. Co.* [1804] 1 Caines, 549; *Schwartz* v. *Insurance Co. of N. A.* [1811] 3 Wash. C. C. 117, Fed. Cas. No. 12,504; *Smith* v. *Delaware Ins. Co.* [1811] 3 Wash. C. C. 127, Fed. Cas. No. 13,035, reversed upon other grounds in 7 Cranch, 434, 3 L. ed. 396; *Ludlow* v. *Union Ins. Co.* [1815] 2 Serg. & R. 119); and that no act will be done on the part of the assured to forfeit the neutral character (*Wilcocks* v. *Union Ins. Co.* [1809] 2 Binn. 574, 4 Am. Dec. 480; *Schwartz* v. *Insurance Co. of N. A.* [1811] 3 Wash. C. C. 117, Fed. Cas. No. 12,504; *Smith* v. *Delaware Ins. Co.* [1811] 3 Wash. C. C. 127, Fed. Cas. No. 13,035). Antineutral conduct forfeits a warranty that the vessel is neutral. *Maryland Ins. Co.* v. *Woods* [1810] 6 Cranch, 29, 3 L. ed. 143. Where a ship is warranted neutral, the insured, in order to comply with his warranty, must not only maintain the property to be neutral, but so conduct himself towards the belligerent parties as not to forfeit his neutrality. He must pursue the conduct and preserve the character of a neutral; and for that purpose must furnish himself and keep in his possession the ordinary evidence of his neutrality unless deprived of it by some inevitable misfortune. *Cleveland* v. *Union Ins. Co.* (1811) 8 Mass. 308.

Likewise, a warranty that the property insured is of a certain nationality means that it is not only so in fact, but that it shall be clothed with the requisite evidence of its national character for the purpose of protection, and in reference to the law of nations, under the sanction of which the voyage in question is to be conducted. *Barker* v. *Phœnix Ins. Co.* [1811] 8 Johns. 307, 5 Am. Dec. 339. If a ship be warranted American she must not only belong to an American, but must in every respect be so documented as to entitle herself during the whole of her voyage to the privileges of the American flag. *Baring* v. *Clagett* [1802] 3 Bos. & P. 215, 5 East, 398, 14 Eng. Rul. Cas. 155; *Coolidge* v. *New York Firemen Ins. Co.* [1817] 14 Johns. 308. By a warranty of American property it is understood not only that the ship belongs to an American citizen at the time of the insurance, but that it shall continue so during the voyage, and that the captain and agents of the owners will conduct themselves conformably to the laws to which neutrals are subject. *Schwartz* v. *Insurance Co. of N. A.* [1814] 6 Binn. 378. A warranty that a cargo is American property implies that it shall not lose that character during the voyage insured by any act or omission of the assured or of his agents, and that it shall be accompanied by all the necessary documents to establish its neutrality, if questioned, which are required by treaties or by the law of nations. *Calbreath* v. *Gracy* (1805) 1 Wash. C. C. 219, Fed. Cas. No. 2,296.

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In *Higgins* v. *Livermore* (1817) 14 Mass. 106, it is said that the description of a vessel as of a certain nationality amounted to a warranty at least that she was furnished with regular documents in that character; but in *Lewis* v. *Thatcher* (1819) 15 Mass. 431, such qualification was deplored, and it was held that a warranty of nationality is absolute, and not made good by a colorable furnishing of documents intended to prove her of the nationality named.

A warranty of a ship being American does not mean that she is American built, but only that she is the property of an American subject (*Wilson* v. *Backhouse* [1806] Peake, N. P. Add. Cas. 119); and a warranty that a vessel is an "American bottom" does not mean that the vessel is American built or is an American registered vessel, but merely that it is a vessel owned by citizens of the United States and furnished with the usual documents required by our law and treaties with foreign nations so as to protect her from belligerent capture (*Griffith* v. *Insurance Co. of N. A.* [1813] 5 Binn. 464).

To prove a warranty that the ship insured was of a particular nation, it is prima facie evidence that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port. *Arcangelo* v. *Thompson* (1811) 2 Campb. 620, 12 Revised Rep. 758.

Although a warranty of neutrality relates to the conduct of the voyage as well as to the ownership of the property, the insurer may nevertheless be liable where the unneutral conduct falls within the description of a risk insured against. Thus where in a policy expressly insuring against barratry the insured warrants the property neutral, the insurer is liable for the consequences of unneutral conduct which amounts to barratry. *Wilcocks* v. *Union Ins. Co.* (1809) 2 Binn. 574, 4 Am. Dec. 480.

Where property is warranted neutral, it is incumbent upon the underwriters to show that it was not accompanied by proper documents. *Ludlow* v. *Union Ins. Co.* (1815) 2 Serg. & R. 119.

Such a warranty does not impose upon the insured the obligation to claim property when captured, but he may thereupon abandon to the insurer. *Gardere* v. *Columbia Ins. Co.* (1811) 7 Johns. 514.

A warranty of neutrality does not require compliance with the peculiar regulations of a belligerent state not warranted by the law of nations, to which the neutral country has not assented. *Pollard* v. *Bell* (1800) 8 T. R. 434, 5 Revised Rep. 404; *Bird* v. *Appleton* (1800) 8 T. R. 562, 5 Revised Rep. 468, 13 Eng. Rul. Cas. 547; *Price* v. *Bell* (1801) 1 East, 663; *Nonnen* v. *Reid* (1812) 16 East, 176; *Siffken* v. *Lee* (1807) 2 Bos. & P. N. R. 484, 9 Revised Rep. 676.

If goods be insured from one port to another in a neutral ship, it is sufficient to charge the underwriters that the ship was neutral

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when she sailed (*Tyson* v. *Gurney* [1789] 3 T. R. 477); and under a warranty that the ship and cargo are neutral property it is sufficient that they are neutral when the risk commences, and the warranty is not falsified because the subsequent breaking out of hostilities makes the property belligerent property (*Eden* v. *Parkison* [1781] 2 Dougl. K. B. 732).

A warranty that a ship is American is fulfilled by proof that she was owned by an American citizen and had all the papers for an American vessel except a register, having sailed with a sea letter only (*Barker* v. *Phœnix Ins. Co.* [1811] 8 Johns. 307, 5 Am. Dec. 339; *Griffith* v. *Insurance Co. of N. A.* [1813] 5 Binn. 464); and a warranty that a ship is British does not require the ship to have a British register, but it is sufficient that she is owned by a British subject (*Mackie* v. *Pleasants* [1810] 2 Binn. 363).

The mere act of carrying a belligerent's goods is no breach of neutrality (*Barker* v. *Blakes* [1808] 9 East, 283) because the law of nations does not prohibit the carrying of enemy's goods in neutral vessels; but if the neutral endeavors by false appearances to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect, and the increase of risk of being carried in for adjudication is produced, not by a legal act, as in the case of the carriage of belligerent property, but by a fraud on the neutrality of the government of the insured and upon the rights of the belligerent. *Schwartz* v. *Insurance Co. of N. A.* [1811] 3 Wash. C. C. 117, Fed. Cas. No. 12,504; *Schwartz* v. *Insurance Co. of N. A.* [1814] 6 Binn. 378; *Blagge* v. *New York Ins. Co.* [1804] 1 Caines, 549. The insurers of cargo warranted neutral are discharged if the general agent of the assured, though without the knowledge or consent of his principal, accepts belligerent property to be carried in the same vessel, notwithstanding it is plainly distinguished. *Phœnix Ins. Co.* v. *Pratt* (1810) 2 Binn. 308; *Pratt* v. *Phœnix Ins. Co.* (1810) 1 Browne (Pa.) 152.

If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality if the other joint owner whose interest is not insured be a belligerent. *Livingston* v. *Maryland Ins. Co.* (1810) 6 Cranch, 274, 3 L. ed. 222.

A warranty of neutral property is broken by an assignment of part of the subject insured to a belligerent, though after capture. *Goold* v. *United Ins. Co.* (1804) 2 Caines, 73.

A warranty of nationality is not complied with when, owing to the domicil of the owner in a belligerent country, the property insured is liable to seizure. *Elbers* v. *United Ins. Co.* [1819] 16 Johns. 128; *Arnold* v. *United Ins. Co.* [1800] 1 Johns. Cas. 363. A war-

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ranty of American property is falsified where the owner resides in England, though he is American born, and resides in England only for purposes of trade and with a settled intention to return to America. *Tabbs* v. *Bendelack* (1802) 4 Esp. 108, 3 Bos. & P. 207, note.

A warranty of American property is supported by proof that the owner was a naturalized American citizen, though he emigrated from a belligerent country *flagrante bello*. *Duguet* v. *Rhinelander* (1801) 1 Cai. Cas. XXV., 2 Johns. Cas. 476, reversing 1 Johns. Cas. 360. *Contra: Jackson* v. *New York Ins. Co.* (1801) 2 Johns. Cas. 191.

A warranty that a ship is American property is falsified by the absence of a passport required by a treaty between France and America (*Rich* v. *Parker* [1798] 7 T. R. 705, 4 Revised Rep. 552, 14 Eng. Rul. Cas. 149); or where the vessel navigates the sea as ostensibly belonging to a subject of a belligerent power (*Calbreath* v. *Gracy* (1805) 1 Wash. C. C. 219, Fed. Cas. No. 2,296).

A representation that the vessel insured will have on board an original bill of sale or an attested copy to show that the vessel is owned by American citizens is not complied with by merely having such a paper on board, where the master, in consequence of not knowing the fact, was unable to produce it when it was needed to save the vessel from condemnation as enemy's property. *Murray* v. *Alsop* (1802) 3 Johns. Cas. 47.

A warranty of nationality is violated by a transfer of the vessel insured in trust to secure a debt due to one who is a subject of a belligerent. *Murray* v. *United Ins. Co.* (1801) 2 Johns. Cas. 168.

But a warranty that a vessel is American property is not falsified by the fact that she is contracted to be sold and transferred at a future day, the seller meanwhile to continue the owner, where such agreement to sell is not a mere cover for belligerent property. *Murgatroyd* v. *Crawford* (1799) 3 Dall. 491, 1 L. ed. 692.

In *Ludlow* v. *Bowne* (1806) 1 Johns. 1, 3 Am. Dec. 277, it was held that the neutral character of goods contracted to be sold to a citizen of a belligerent country is not thereby destroyed where no title is to pass until delivery and payment, the vendor undertaking to deliver the goods, taking all risks in transit, provided the agreement is not a mere cover to prevent seizure. Kent, Ch. J., however, was of the opinion that as the goods were shipped in time of war, and the agreement appeared to have been made with an express and pointed reference to maritime capture, the agreement was a collusive one to cover the property, and therefore that the warranty that the goods insured were American property was broken. The foregoing decision was followed in *De Wolf* v. *New York Firemen Ins. Co.* (1822) 20 Johns. 214, affirmed in 2 Cow. 56, where the vendor agreed to deliver the cargo at either of certain ports at 5 per cent

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advance on the invoice or cost and the freight and premium of insurance.

But goods purchased by an enemy subject under an executory contract, and contingent upon a delivery at the risk of the neutral merchant, are held by prize courts to be subject to condemnation as enemy property. See *The Atlas* (1801) 3 C. Rob. 299.

And it has been held that a warranty of American property is falsified where the property is not to be delivered to the American purchasers unless paid for. *Warder* v. *Horton* (1812) 4 Binn. 529.

A vessel may lawfully sail for a blockaded port for the purpose of inquiring as to the continuance of the blockade (*Naylor* v. *Taylor* [1829] 9 Barn. & C. 718, 4 Moody & R. 526; *Maryland Ins. Co.* v. *Woods* [1810] 6 Cranch, 29, 3 L. ed. 143; *Sperry* v. *Delaware Ins. Co.* [1808] 2 Wash. C. C. 243, Fed. Cas. No. 13,236); but an attempt knowingly to break a blockade is a violation of neutral duty, and not a risk insured (*Vos* v. *United Ins. Co.* [1801] 1 Cai. Cas. VII., s. c. 2 Johns. Cas. 469). An entry of the port after being warned of the blockade is not, however, a breach of neutrality if the blockading force is not before the port (*Williams* v. *Smith* [1802] 2 Caines, 1, 2 Am. Dec. 209), unless the blockading fleet has been accidentally dispersed and intends to return (*Radcliff* v. *United Ins. Co.* [1810] 7 Johns. 38). An avowal of intention to enter a blockaded port after warning, and while still under detention by the blockading force, is not an attempt to enter it which will falsify a warranty of neutrality. *Fitzsimmons* v. *Newport Ins. Co.* (1808) 4 Cranch, 185, 2 L. ed. 591.

A warranty of neutrality will not exonerate the insurer from liability for a breaking up of the voyage in consequence of a blockade of the port of destination. The insured thereby engages only that he will not break the blockade; not that he will bear the loss resulting from the blockade. *Thompson* v. *Read* (1820) 12 Serg. & R. 440.

A passport granted by a government to protect against its own cruisers is not a sailing under the protection of the flag of that country so as to violate an implied warranty of neutrality. *Jenks* v. *Hallet* (1803) 1 Caines, 60, affirmed in 1 Cai. Cas. 43.

It is not a breach of a warranty of neutrality for the vessel insured to take convoy, if during the voyage insured she has become exposed to seizure by the other belligerent. *Snowden* v. *Phœnix Ins. Co.* (1811) 3 Binn. 457.

Where an American vessel sailing the next day after a British convoy came up with the convoy the day after, and kept company with it, without, however, receiving or exchanging any signals or receiving any assistance from the convoy, and without altering its course or retarding its voyage on account of the convoy, it is not to be considered as sailing under a British convoy so as to affect the right of

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the insured to recover for a total loss in consequence of a capture by the French, though the ground of the condemnation was stated to be her having sailed under British convoy. *Lawrence* v. *Ocean Ins. Co.* (1814) 11 Johns. 241.

The rescue of a neutral ship from a belligerent while under detention is such a breach of neutrality as will exonerate the underwriters in case of loss (*M'Lellan* v. *Maine F. & M. Ins. Co.* [1815] 12 Mass. 246; *Garrels* v. *Kensington* [1799] 8 T. R. 230, 4 Revised Rep. 635). In *Wilcocks* v. *Union Ins. Co.* (1809) 2 Binn. 574, 4 Am. Dec. 480 (a nisi prius case) it is said that the crew of a neutral vessel captured and sent in for adjudication are not obliged to navigate the vessel, and the captors are bound to put sufficient force of their own on board; that, should they send so few men that it is manifestly impossible to work the ship, the neutrals are not obliged to submit their property and lives to the mercy of the winds and waves, and may lawfully consider the vessel as abandoned to them and act accordingly. But if a force insufficient to work the vessel is put on board by the captors in consequence of the promise of the neutral crew to navigate her to the destined port, they are bound by such promise, and must be considered for the purpose agreed on as the hands of the captors; and if in violation of their promise they take the vessel into their own hands, it is an unlawful rescue which will exonerate the insurer.

The fact that a vessel has been seized on suspicion of a breach of neutrality does not establish a breach of neutrality so as to exonerate the insurer from liability for capture. *Smith* v. *Steinbach* (1805) 2 Cai. Cas. 158.

A complete discussion of the effect of a decree of a foreign prize court as evidence of a breach of warranty would go beyond the scope of this note; and it suffices here to state that, after some fluctuations of opinion, apparently occasioned by the rapacity of the French during the Napoleonic Wars, it is generally held in England that the sentence of such a court, where proceeding on the ground of unneutral conduct or failure to establish the neutral character of the property in question, is conclusive evidence of a noncompliance with a warranty of neutrality. This is on the ground that as prize courts are tribunals proceeding under the law of nations, their judgments should be given international effect. It is probable that, should the question come before them, the American courts would arrive at the same conclusion as the English courts, notwithstanding the early decisions to the contrary. See, as bearing upon this point, *Geyer* v. *Aguilar* (1798) 7 T. R. 681, 4 Revised Rep. 543; *Baring* v. *Clagett* (1802) 3 Bos. & P. 201, 5 East, 398, 14 Eng. Rul. Cas. 155; *Lothian* v. *Henderson* (1803) 3 Bos. & P. 499, 7 Revised Rep. 829; *Siffken* v. *Lee* (1807) 2 Bos. & P. N. R. 484, 9 Revised Rep. 676; *Hobbs* v. *Henning* (1864) 17 C. B. N. S. 791, 34 L. J. C. P. N. S. 117, 11

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Jur. N. S. 223, 12 L. T. N. S. 205, 13 Week. Rep. 431; *Maryland Ins. Co.* v. *Woods* (1810) 6 Cranch, 29, 3 L. ed. 143; *Vasse* v. *Ball* (1797) 2 Yeates, 178, 2 Dall. 270, 1 L. ed. 377; *Bailey* v. *South Carolina Ins. Co.* (1813) 3 Brev. 354; *Bourke* v. *Granberry* (1820) Gilmer (Va.) 16, 9 Am. Dec. 589.

The foregoing rule sometimes bears too hard on the assured; and has in some jurisdictions been altered by statutes making the sentences of foreign prize courts prima facie evidence only. Its effect has also been avoided by stipulations in the policy fixing the place at which proof of compliance with the warranty is to be required. See *Calbreath* v. *Gracy* (1805) 1 Wash. C. C. 219, Fed. Cas. No. 2,296, where such a stipulation was held not to preclude the underwriters from reading the sentence of the foreign prize court as evidence.

Where a vessel is warranted neutral, "proof of which to be required in the United States only," the reservation of the right of giving proof in the United States may reasonably be considered as coextensive with the warranty itself, and as the conduct of the vessel is in legal construction comprehended in the warranty of her neutrality, such conduct is likewise comprehended in the reservation of the right to make proof in the United States. *Maryland Ins. Co.* v. *Woods* (1810) 6 Cranch, 29, 3 L. ed. 143.

The English law relating to warranties of neutrality as laid down in the earlier decisions has to a certain extent been modified by the marine insurance act 1906 (6 Edw. VII. chap. 41). Section 36 of that act provides that where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that so far as the assured can control the matter its neutral character shall be preserved during the risk. The same section further provides that where a ship is expressly warranted "neutral" there is also an implied condition that so far as the assured can control the matter she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition the insurer may avoid the contract.

c. Of ownership.

A warranty in a policy of insurance that the property is the insured's is falsified by his having concealed papers on board, which justly excites suspicion that the property belongs to an enemy of the belligerent making the capture. *Carrere* v. *Union Ins. Co.* (1837) 3 Harr. & J. 324, 5 Am. Dec. 437.

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VI. Conditions occasioned by war as justifying deviation.

The term "deviation," originally employed to express the wandering or straying of a vessel from the customary course of the voyage, has come to have a wide significance as comprehending every departure from the ordinary course of conduct tending to vary or increase the risk; and is so employed in this note.

A deviation to avoid an enemy or to seek for a convoy is justifiable (*Patrick* v. *Ludlow* [1802] 3 Johns. Cas. 10, 2 Am. Dec. 130; *Miller* v. *Russell* (1793) 1 Bay [S. C.] 309 [*dictum*]); and it is always a question of fact whether the peril be so present and palpable as to excuse a deviation (*Post* v. *Phœnix Ins. Co.* (1813) 10 Johns. 79). It is no deviation to put into port to avoid capture (*Ibid.*); or to depart from the usual route in order to avoid the chance of detention by the cruisers of a belligerent (*Reade* v. *Commercial Ins. Co.* (1808) 3 Johns. 352, 3 Am. Dec. 495; *Goyon* v. *Pleasants* (1814) 3 Wash. C. C. 241, Fed. Cas. No. 5,647).

Insurance on a cargo is not terminated by failure to proceed to the port of destination, where to do so would subject the cargo to confiscation. *Coolidge* v. *Gray* (1812) 8 Mass. 527.

It has been held, on the one hand, that a warning of the ship away from a blockaded port, accompanied by an indorsement of her papers, will justify a deviation (*Snowden* v. *Phœnix Ins. Co.* (1811) 3 Binn. 457); and that insurance against sea risks covers a loss happening in that way after the vessel has been turned away from her port by a vessel belonging to a blockading squadron, the deviation in such case being a necessary one (*Robinson* v. *Marine Ins. Co.* (1806) 2 Johns. 89); on the other hand, that a policy containing a contract for a specific voyage cannot be extended by implication to cover the ship in a deviation occasioned by her being ordered away from her port of destination, which had fallen into the hands of the enemy (*Parkin* v. *Tunno* (1809) 11 East, 22, 2 Campb. 59, 10 Revised Rep. 422).

False information that the port of destination is blockaded will not justify the captain of a vessel in turning back. *King* v. *Delaware Ins. Co.* (1810) 6 Cranch, 71, 3 L. ed. 155.

Where a vessel *en route* for a port in Holland proceeded to Plymouth, in England, for the purpose of procuring intelligence as to a blockade of which she had received information, and while there was informed of the French decrees which declared all vessels good prize which had been at a British port, accordingly determined to proceed to London and discharge the cargo, it was held that the proceeding to London was a deviation, and the insurer of the cargo consequently not liable as for a loss of the voyage. *Lee* v. *Gray* (1811) 7 Mass. 349.

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This case was followed in *Tucker* v. *United M. & F. Ins. Co.* (1815) 12 Mass. 288, where the ship insured, instead of voluntarily entering an English port, was captured and forcibly carried there by a British armed vessel.

In *Tenet* v. *Phœnix Ins. Co.* (1811) 7 Johns. 363, where a vessel insured from New York to Bordeaux by a policy containing a warranty permitting the vessel to proceed "to another near open port," if refused admittance or turned away was turned back from her port of destination by a blockading squadron, by whom the master was warned that if he attempted to enter any port under the influence of France his vessel and cargo would be liable to capture and condemnation by the British, and accordingly shaped a course for England, but, springing a leak, was compelled by necessity to put into a French port, it was held that the term, "near open port," must be understood in a geographical sense, and that as the English ports were not to be considered as near ports to Bordeaux, the attempt of the master to reach them was a deviation which put an end to the policy.

The insurer of goods from the port of departure to that of destination is not liable where the vessel carrying them is lost while returning hime, having been turned back by news of an embargo at the port of destination. *Blackenhagen* v. *London Assur. Co.* (1808) 1 Campb. 454, 10 Revised Rep. 729, 13 Eng. Rul. Cas. 650.

The carrying of a neutral ship out of the course of her voyage by a belligerent cruiser is not a deviation which will discharge the insurer. *Scott* v. *Thompson* (1805) 1 Bos. & Pul. N. R. 181.

In *Phelps* v. *Auldjo* (1809) 2 Campb. 350, 11 Revised Rep. 725, where a merchantman while in harbor was directed by the captain of a King's ship to go out to sea and examine a strange sail which was discovered in the offing bearing enemy's colors, and did so without duress or compulsion, physical or moral, it was held a deviation which terminated the insurance, though the stranger proved to be a neutral and the vessel returned safely to port.

A delay in sailing does not amount to a deviation where it was caused by imminent danger of capture by blockading forces (*Whitney* v. *Haven* (1816) 13 Mass. 172); and where a vessel was prevented from returning on her homeward voyage by an embargo, except upon the condition of sailing in ballast, and remained in port eighteen months until the embargo ceased, when she loaded her cargo and pursued her voyage, she was held to be protected on her homeward voyage by her insurance (*Schroeder* v. *Thompson* (1817) 1 J. B. Moore, 163, 7 Taunt. 462, 18 Revised Rep. 540).

If a vessel capture a hostile vessel in self-defense, she has a consequent right to take possession and man out the prize, and a delay

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for these purposes is not a deviation. *Haven* v. *Holland* (1820) 2 Mason, 230, Fed. Cas. No. 6,229.

When it is expressed in a policy that a ship may take a letter of marque, the insurer is understood to agree that she may capture any ship of the enemy that shall fall in her way, but when the insurance is in the usual form, as on a common mercantile voyage without any mention of her having a letter of marque, although the taking of a commission may not vitiate the policy, yet the use of it for the profit of the owners and the taking of a prize is a deviation. It can make no difference whether the ship goes out of her course to secure the prize, or only abandons her course to make the capture after seeing the prize; whether this abandonment be by altering her course, or by lying to; or whether the time devoted to this object be one hour or one month; as otherwise it would be impossible to say to what extent a ship, under such circumstances, may depart from the regular course of her voyage, and the underwriter be exposed to take hazards as great as when he expressly agrees that the ship may take a commission and make captures. *Wiggin* v. *Amory* (1816) 13 Mass. 118.

And it makes no difference that before the underwriter subscribed the policy he knew the ship was armed and equipped and commissioned as a letter of marque, where the vessel was a merchant vessel and insured for a mercantile voyage only. "The knowledge that a vessel is armed, and has a commission, does not necessarily carry with it an assent that the vessel shall do anything which shall cause a delay of her voyage, or that her commission shall be used, except for defense. It may be that she is armed only for the purpose of defense, and that her commission is to be used only to justify the attack of such vessels as may come in her way; and possibly the capture of such vessels, if that can be done without delaying the voyage. And the knowledge of such armament and commission may render it unnecessary to represent the true state of the vessel, in order to make the underwriter liable, in case the risk should be increased thereby. But it cannot amount to an assent that any deviation from, or delay of, the voyage should take place, in consequence of the new character of the vessel." *Wiggin* v. *Boardman* (1817) 14 Mass. 12.

A vessel armed as a letter of marque, and insured or known to the insurer as such, has no right to cruise at large for prizes, but may chase and capture hostile vessels which are met with and are in sight in course of the voyage. *Haven* v. *Holland* (1820) 2 Mason, 230, Fed. Cas. No. 6,229.

Where a vessel is described in a policy of insurance as a letter of marque, the insured will be protected even if a departure from the

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course of the voyage has taken place in pursuit of a vessel which had hove in sight during the course of the voyage. *Wiggin* v. *Boardman, supra.*

Where insurance was upon an armed ship from the United States to India, with liberty to cruise and capture vessels and goods of the enemy, convoying her prizes for eight or ten days is no deviation where it does not appear that the ship went out of her way to convoy, or that she was delayed thereby, and it was found by the jury that the risk was not increased by the act of convoying. *Ward* v. *Wood* (1816) 13 Mass. 539.

But permission given in a policy, "to chase, capture, and man prizes," does not prevent acting as convoy to a prize, and slackening sail in the course of the voyage insured in order to make the rate of sailing of the captor conform to that of the prize, from being a deviation. *Lawrence* v. *Sydebotham* (1805) 6 East, 45, 2 Smith, 214, 8 Revised Rep. 385, 9 Eng. Rul. Cas. 402.

The fact that the vessel cleared for a neutral port when in reality bound for a belligerent port will not avoid insurance on cargo, the object being to diminish, and not to increase, the risk of capture. *McFee* v. *South Carolina Ins. Co.* (1823) 2 M'Cord, L. 503, 13 Am. Dec. 757.

VII. Liability in case of capture.

a. Generally.

As to when the insurer of captured property may be held liable as for a total loss, see heading, "Extent of liability; right to abandon to insurer and recover as for total loss," *infra.*

As between the insurer and the insured it is immaterial whether the capture is in accordance with the law of nations or not (*Kohne* v. *Insurance Co. of N. A.* (1814) 6 Binn. 219; *Seymour* v. *London & P. M. Ins. Co.* (1872) 1 Asp. Mar. L. Cas. 423, 41 L. J. C. P. N. S. 193, 27 L. T. N. S. 417); as any other rule would furnish but a very imperfect indemnity to the assured (*Mauran* v. *Alliance Ins. Co.* (1867) 6 Wall. 1, 18 L. ed. 836).

On the other hand, if the insured does any act which increases the risk of capture and detention, according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased should be the risk of rightful capture according to the law of nations. *Livingston* v. *Maryland Ins. Co.* (1813) 7 Cranch, 506, 3 L. ed. 421.

A rescue by her crew of a neutral vessel arrested and detained by a belligerent armed vessel for an alleged violation of neutrality is a good cause of condemnation, and a loss happening from this cause is

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not within a policy insuring against the usual risk. *Robinson* v. *Jones* (1812) 8 Mass. 536, 5 Am. Dec. 114.

Where a neutral vessel carrying belligerent property under bills of lading representing the cargo to be owner's property on which no freight was to be paid is captured, and the cargo condemned without allowance of freight to the owners of the vessel for the reason that the bills of lading were as above stated, the assured is not entitled to recover upon a policy of insurance upon the freight, the direct cause of the loss not being a casualty or event within the contract of insurance, but a violation of the implied engagement of the insured that the vessel and voyage upon which freight was insured should be conducted according to law. *Stocker* v. *Merrimack M. & F. Ins. Co.* (1810) 6 Mass. 220.

A ship is lost by capture though she be never condemned at all or carried into any port or fleet of the enemy, and the insurer must pay the value. *Goss* v. *Withers* (1758) 2 Burr. 683, 2 Ld. Kenyon, 325, 1 Eng. Rul. Cas. 1. But a warranty "not to abandon in case of capture until condemned" is to be construed according to the ordinary sense of the terms used; and so understood must be taken to mean a capture *jure belli* and a judicial condemnation in a prize court of competent jurisdiction; and accordingly, where a captured vessel is, without any judicial proceedings being had against her, taken into the service of the government of the captor, the insured has no right to abandon. *Barney* v. *Maryland Ins. Co.* (1820) 5 Harr. & J. 139.

A recovery may be had for loss by capture, though the capture was made by collusion of the master of the vessel. *Arcangelo* v. *Thompson* (1811) 2 Campb. 620, 12 Revised Rep. 758.

A friendly capture will not exonerate the underwriters from liability for a subsequent belligerent capture, where the risk was lessened rather than increased by the friendly capture. *Governeur* v. *United Ins. Co.* (1804) 1 Caines, 592.

The insurers are liable to pay the charge of a compromise made in good faith to prevent the ship from being condemned as lawful prize. *Behrens* v. *Rucker* (1761) 1 W. Bl. 313.

Where goods insured were captured, and, pending appeal from a decree of restitution, were delivered to the consignees upon their giving a bond to the amount of the appraised value of the property to abide the determination of the appeal, the amount of which bond was greater than the sum insured, and, the final decision being in favor of the captors, the consignees where obliged to pay the bond, the insured may, without abandoning the proceeds of the cargo, recover the amount paid on the bond, or as much thereof as was covered by the insurance as a partial loss. *Gracie* v. *New York Ins. Co.* (1811) 8 Johns. 237.

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Where all the ship's papers were seized and never restored, the jury are warranted in finding a total loss by capture, though the vessel, owing to a recapture, is liberated to the owners on the payment of salvage before abandonment and before the expiration of six months from the notice of capture. *Post* v. *Phœnix Ins. Co.* (1813) 10 Johns. 79.

Where a ship is not represented to be of any particular country at the time the policy of insurance on goods on board such ship is subscribed, and there is no undertaking in the policy itself that she was of a certain nationality, there is no necessity for her being documented as of such nationality in order to render the insurer liable for a loss of the goods insured by capture. *Dawson* v. *Atty* (1807) 7 East, 367.

But in the case of a policy on a ship, whether there is a warranty or representation respecting the nation to which the ship belongs or not, the shipowner is bound to have such documents as are required by treaties of particular nations on board to evince his neutrality with respect to such nations, and the insurer is accordingly not liable for a loss by capture occasioned by the want of them, the neglect of the shipowners themselves being in such case the efficient cause of the loss. *Bell* v. *Carstairs* (1811) 14 East, 374, 2 Campb. 544, 14 Eng. Rul. Cas. 319.

By the mercantile law, where the national character of the vessel is not made a part of the contract of insurance, the want of proper documents to show such character is not material unless it appears that the risk was enhanced or that the loss happened in consequence of the want of them, in which case the insured cannot recover. *Polleys* v. *Ocean Ins. Co.* (1837) 14 Me. 141.

There is an implied warranty on the part of the insured that everything should be done to prevent a loss; and so where the capture of the ship is due to the captain's negligence in leaving behind the ship's register, by which its neutral character would have been established, the underwriters are not liable. *Cleveland* v. *Union Ins. Co.* (1811) 8 Mass. 308.

The underwriter is not answerable for the loss of a ship by condemnation for carrying simulated papers, where no leave to carry such papers has been given, though without such papers the vessel would certainly have been seized and condemned as coming from an enemy's country. *Horneyer* v. *Lushington* (1812) 15 East, 46, 3 Campb. 85, 13 Revised Rep. 759, 13 Eng. Rul. Cas. 637; *Oswell* v. *Vigne* (1812) 15 East, 70, 13 Revised Rep. 375. But where by the terms of the policy the assured had liberty to carry simulated papers, the underwriters cannot be discharged from the loss if the sentence of condemnation appeared to have been on account of the

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ship's carrying simulated papers, or if that circumstance mixed up with other considerations operated in proportion at all as the ground of condemnation. *Bell* v. *Bromfield* (1812) 15 East, 364.

The refusal of a prize court discharging a neutral vessel to allow damages and costs for detention because she was not documented according to the ordinances of the country, though she was documented according to the laws of nations, does not discharge the underwriters from liability. *Siffken* v. *Lee* (1807) 2 Bos. & P. N. R. 484, 9 Revised Rep. 676.

b. Capture of neutral by belligerent.

The taking of a neutral ship is upon the same footing, as respects a contract of insurance, with the capture by an enemy in open war (*Lee* v. *Boardman* (1807) 3 Mass. 238, 3 Am. Dec. 134); so, where a neutral vessel is seized by a belligerent as a prize, the capture may be considered a hostile one within the meaning of the policy (*Lovering* v. *Mercantile M. Ins. Co.* (1832) 12 Pick. 348), and entitles the assured to abandon (*Rhinelander* v. *Insurance Co. of Pennsylvania* (1807) 4 Cranch, 29, 2 L. ed. 540; *Murray* v. *United Ins. Co.* (1801) 2 Johns. Cas. 263; *Dutilh* v. *Gatliff* (1806) 4 Dall. 446, 1 L. ed. 903).

A seizure by a foreign state of a vessel in a port of that state, under a suspicion of a breach of neutrality, is a loss within the clause in a policy of insurance against the restraint of princes. *Smith* v. *Steinbach* (1805) 2 Cai. Cas. 158.

c. Effect of capture on time policy.

A vessel captured and carried into port is still "at sea" within the stipulation of a time policy that if the vessel shall be at sea at the expiration of the term the risk shall continue at the same rate of premium until her arrival at port. *Wood* v. *New England M. Ins. Co.* (1817) 14 Mass. 31, 7 Am. Dec. 182; *Hutton* v. *American Ins. Co.* (1843) 7 Hill, 321 (*dictum*).

A clause terminating the insurer's liability after the ship has been twenty-four hours moored in safety does not operate where the ship is detained as a prize after arriving in port. *Minett* v. *Anderson* (1793) Peake, N. P. Cas. 211, 3 Revised Rep. 692.

Where a vessel is captured during the term of the policy of insurance, but not condemned until after its expiration, the underwriters are liable, although the assured elected not to abandon on receiving intelligence of the capture, where the delay has not operated to the prejudice of the insurers. *Dorr* v. *New England Ins. Co.* (1814) 11 Mass. 1.

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VIII. Liability as affected by deviation or loss of voyage occasioned by apprehension of capture.

It has been held that a fear of capture, however reasonable, is not a peril insured against (*Cook* v. *Essex Fire & M. Ins. Co.* (1809) 6 Mass. 122; *Lee* v. *Gray* (1811) 7 Mass. 349; *Brewer* v. *Union Ins. Co.* (1813) 12 Mass. 170, 7 Am. Dec. 53); and does not constitute justifiable cause of abandonment to the insurer (*Craig* v. *United Ins. Co.* [1810] 6 Johns. 226, 5 Am. Dec. 222; *Corp* v. *United Ins. Co.* [1811] 8 Johns. 277; *Richardson* v. *Maine F. & M. Ins. Co.* [1809] 6 Mass. 102, 4 Am. Dec. 92; *Amory* v. *Jones* [1810] 6 Mass. 318; *Lee* v. *Gray* [1811] 7 Mass. 349; *King* v. *Delaware Ins. Co.* [1808] 2 Wash. C. C. 300, Fed. Cas. No. 7,788; *Becker* v. *London Assurance Corporation* [1915] 3 K. B. 410, 84 L. J. K. B. 1993, 31 T. L. R. 538, [1915] W. N. 288). So, also, the mere apprehension of danger will not justify an abandonment of the voyage to the prejudice of the underwriter. *Shapley* v. *Tappan* (1812) 9 Mass. 20. Where a voyage is relinquished through apprehension of seizure at the port of destination, insurance on freight is not recoverable. *Tucker* v. *United M. & F. Ins. Co.* (1815) 12 Mass. 288.

The hardships of the situation in which this rule puts the assured are discussed by Tilghman, Ch. J., in *Savage* v. *Pleasants* (1813) 5 Binn. 403, 6 Am. Dec. 424, as follows: "To permit the assured to abandon in every instance where capture is apprehended would place the assurer upon a very uncertain and unjust footing, because there might be an affected or even a real fear, where there was very little actual danger, and it is truly said that the risk of capture is one of the immediate objects of the insurance, and therefore the assurer has a right to insist on the chance of escape, of which he is deprived by the relinquishment of the voyage. On the other hand, the assured may be placed in a very hard situation as the law has been held. If he attempts to enter a blockaded port after notice, he forfeits the right of a neutral; if he attempts to trade in a port into which an entry has been prohibited, even after the commencement of the voyage, his property is liable to confiscation; and if, being refused an entry, he steers for a different port, the underwriters are discharged, because it is not the same voyage which was insured. Thus without any default of the assured, his property is left uncovered."

In *Thompson* v. *Read* (1820) 12 Serg. & R. 440, it is said: "The general principle is agreed that if the voyage be relinquished merely through fear of capture, the loss is not covered by the policy; but it is held by some that if the danger be so great as to amount almost to a certainty of capture, it is a peril for which the insurer is responsible, a restraint within the meaning of the policy. That this should be the law is certainly for the interest of all parties; if the

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voyage is abandoned, the property is saved and ceded to the insurers; but what advantage can it be to them for the insured to rush into danger with the certainty of loss?"

And in *Becker* v. *London Assur. Corp.* [1915] 3 K. B. 410, it was said by Bailhache, J. "Whether the avoidance of a peril, or an attempt to avoid a peril, is the same thing as a loss by the peril depends very much on what the nature of the peril is, and it seems to me quite clear upon the cases that an attempt to avoid capture is not the same as a loss by capture. I do not think it is absolutely necessary that there should be a *de facto* capture; I think that appears from *Butler* v. *Wildman* (1820) 3 Barn. & Ald. 398, 22 Revised Rep. 435, the case of the Spanish dollars. On the other hand it is quite clear that the avoidance of a peril under most circumstances is not the same as loss by the peril itself. That appears from a number of cases, *Hadkinson* v. *Robinson* (1803) 3 Bos. & P. 388, 7 Revised Rep. 786; *Nickels & Co.* v. *London & P. M. & G. Ins. Co.* (1901) 6 Com. Cas. 15, *ante*, 1, 70 L. J. Q. B. N. S. 29, 17 Times L. R. 54; and *Kacianoff* v. *China Traders' Ins. Co.* [1914] 3 K. B. 1121, 83 L. J. K. B. N. S. 1393, 111 L. T. N. S. 404, 30 Times L. R. 546, 19 Com. Cas. 371. That being the state of the authorities, and bearing in mind that on the one hand actual capture is not necessary, and on the other hand that (to use an expression used in the *Kacianoff Case, supra*), the peril must have begun to operate, or (to borrow another expression from *Hadkinson* v. *Robinson, supra*), that the peril must operate directly and not circuitously, what one has to consider is what is the true view to be taken upon the facts in this case? It is obviously a question of degree, and that being so, the dividing line between one case and another must often appear very thin and subtle."

One of the cases to which allusion is made in the excerpt from *Thompson* v. *Read, supra,* as holding that if the danger be so great as to amount almost to a certainty of capture, it is a peril for which the insurer is responsible, is *Saltus* v. *United Ins. Co.* (1818) 15 Johns. 523, where it was held that the insured is warranted in abandoning where the harbor in which the vessel is lying is so invested by the enemy's squadron as to make it morally certain that the vessel will be captured if she attempts to run the blockade.

But in *Brewer* v. *Union Ins. Co.* (1813) 12 Mass. 170, 7 Am. Dec. 53, where an American ship was in a neutral harbor when the news of war between the United States and Great Britain reached that place, and the commanders of two British ships of war lying in the river announced their intention of capturing the ship if she should attempt to sail, it was held that although sailing would have been attended with imminent risk, there was no such application of hostile force as to warrant an offer to abandon to the insurer; the court

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saying that otherwise the fear of capture would become a peril insured against, and that while the case was certainly a very strong one, they could not make nice distinctions.

In *Becker* v. *London Assur. Corp. supra,* it was said that if the vessel had been chased into the neutral port in which she had taken refuge the peril of capture would have begun to operate, and in that case it might be said that the abandonment of the voyage and the constructive total loss of the goods by the destruction of the venture was caused by a peril within the policy.

For other decisions as to the liability of the insurer as affected by a deviation or loss of voyage occasioned by an apprehension of capture, see subdivision of this note entitled, "Liability in case of blockade, interdiction, or embargo."

IX. Liability in case of blockade, interdiction or embargo.

a. Blockade.

Blockade running as a breach of warranty of neutrality, see heading, "Liability of insurer as affected by warranties," *supra.*

As to affect of warranty of neutrality to exonerate insurer from liability for a breaking up of the voyage in consequence of a blockade, see *Thompson* v. *Read* (1820) 12 Serg. & R. 440, set forth under the same heading.

As to whether a blockade will justify a deviation, see heading, "Conditions occasioned by war as justifying deviation," *supra.*

As to when a blockade, interdiction, or embargo will warrant an abandonment and recovery as for a total loss, see subdivision X., *infra.*

The fact that the port of destination is known to be blockaded does not render the voyage illegal, so as to discharge the insurer, as the vessel may lawfully proceed there for the purpose of ascertaining whether the blockade continues. See *Naylor* v. *Taylor* (1829) 9 Barn. & C. 718, 4 Moody & R. 526; *Maryland Ins. Co.* v. *Woods* (1810) 6 Cranch, 29, 3 L. ed. 143; *Sperry* v. *Delaware Ins. Co.* (1808) 2 Wash. C. C. 243, Fed. Cas. No. 13,236.

Although a blockading nation may by the law of nations be allowed to consider its notification of a blockade as notice thereof to all the subjects of the nation to which the notification has been made, since it cannot be expected that the blockading nation should be able or require to prove absolute knowledge in the master of the vessels of every other country, such rule cannot be applied to the case of insurance; but whether the master of the vessel knew of the blockade is properly a question of fact for the decision and judgment of the jury. *Harratt* v. *Wise* (1829) 9 Barn. & C. 712, 4 Moody & R. 521, 7 L. J. K. B. 309.

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Information by a belligerent to a neutral that the port of destination is blockaded, and a warning not to proceed thither, do not amount to a restraint or detention within the provisions of an insurance policy against restraint and detainment of princes. *Richardson* v. *Maine F. & M. Ins. Co.* (1809) 6 Mass. 102, 4 Am. Dec. 92; *King* v. *Delaware Ins. Co.* (1808) 2 Wash. C. C. 300, Fed. Cas. No. 7,788; *Cook* v. *Essex F. & M. Ins. Co.* (1809) 6 Mass. 122.

But a blockade and warning may amount to a peril within the words "arrests, restraints, and detainments of princes," where there exists in the fact a right or power to make the restraint effectual and a reasonable degree of certainty that it will be and can be so used (*King* v. *Delaware Ins. Co.* (1808) 2 Wash. C. C. 300, Fed. Cas. No. 7,788, affirmed on other grounds in 6 Cranch, 71, 3 L. ed. 155); and a blockade of sufficient force to prevent a ship from entering the port is a restraint within the meaning of the policy, although the vessel is suffered to return home (*Thompson* v. *Read, supra*). Where a vessel is warned away from her port of destination by a squadron engaged in maintaining a rigorous blockade, and it is apparent that any further attempt to enter the port might have been followed by a forfeiture of the vessel and cargo without any recourse upon the underwriters, and the master could not have gone to any other port without forfeiting his insurance, the voyage is broken up, not by a vague apprehension of danger, but by a direct application of superior force, and the insured may abandon as for a total loss. *Vigers* v. *Ocean Ins. Co.* (1838) 12 La. 362, 32 Am. Dec. 118.

The turning back of a vessel by a blockading squadron under pain of capture and condemnation is a loss by detention within the meaning of a warranty in a policy of insurance on goods "free from British and American capture and detention." *Wilson* v. *United Ins. Co.* (1817) 14 Johns. 227.

The terms of insurance against arrest, restraint, and detainment embraced a case where the port of destination is actually blockaded. *Schmidt* v. *United Ins. Co.* (1806) 1 Johns. 249, 3 Am. Dec. 319.

A vessel within a port blockaded after the commencement of the voyage and prevented from proceeding on it sustains a loss by a peril within that clause of the policy insuring against the "arrest, restraint, and detainment of Kings," etc., for which the insurers are liable. *Olivera* v. *Union Ins. Co.* (1818) 3 Wheat. 183, 4 L. ed. 365.

The investment of the port in which the vessel is lying by a blockading squadron so effectually as to make it morally certain that the vessel will be captured should it leave port is a restraint of princes, or of men of war, within the meaning of the policy of insurance, it not being necessary to constitute a loss by this peril that actual physical force should be applied to the subject insured. *Saltus* v. *United Ins. Co.* (1818) 15 Johns. 523.

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Where, by reason of the siege and complete investment of the city in which the goods are, it becomes impossible to forward them, there is a constructive total loss by restraint of Kings and princes within the terms of the policy, although there is no specific action on the goods themselves. *Rodoconachi* v. *Elliott* (1874) L. R. 9 C. P. 518, 43 L. J. C. P. N. S. 255, 31 Times L. R. 239, 2 Asp. Mar. L. Cas. 399.

But where insurance on goods is only against "unlawful" arrest, restraints, and detainments, the insurer is not liable for the breaking up of a voyage by a lawful blockade. *Thompson* v. *Read* (1820) 12 Serg. & R. 440. If a policy insures against "unlawful arrests, restraints, and detainments of all Kings, princes," etc., the qualification "unlawful" extends in its operation as well to "restraints and detainments" as to "arrests;" and in such case, a detainment by a force lawfully blockading a port is not a peril insured against by a policy containing a warranty of neutrality. *M'Call* v. *Marine Ins. Co.* (1814) 8 Cranch, 59, 3 L. ed. 487. The stopping of a vessel by a blockading squadron, by the commander of whom it is directed to proceed to the port from whence it came, on penalty of seizure and condemnation, is not covered by insurance against "unlawful arrest, restraint, and detainment of all Kings, princes, or people of what nation, condition, or quality whatsoever." *Patterson* v. *Marine Ins. Co.* (1822) 5 Harr. & J. 417.

Since a blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted, the restraint to which a neutral vessel prevented by the blockade from leaving port is subjected is an unlawful one within the meaning of a policy of insurance against unlawful restraint. *Olivera* v. *Union Ins. Co. supra.* On this point it was said by Marshall, Ch. J.: "What, then, according to common understanding, is the meaning of the term 'restraint?' Does it imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say that they are restrained within those limits? The court believes it would not; and, if it would not, then with equal propriety may it be said, when a port is blockaded, that the vessels within are confined, or restrained from coming out. The blockading force is not in possession of the vessels inclosed in the harbor, but it acts upon and restrains them. It is a *vis major,* applied directly and effectually to them, which prevents them from coming out of port. This ap-

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pears to the court to be, in correct language, 'a restraint' of the power, imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel."

In 17 Laws of England (Halsbury) 439, it is said that English law, in holding that although interdiction of commerce, or blockade of the port of destination, or an embargo imposed there, or the imminent danger of capture or seizure, prevent the completion of the insured voyage, the loss of voyage and the expenses thereby occasioned are not considered to be caused by an "arrest, restraint, and detainment," nor by any other peril insured against, because they do not act directly and immediately, but only circuitously on the subject-matter insured,—differs from that which prevails on the continent of Europe.

Whether a blockade is actual or only constructive, or whether it is unduly restrictive of the rights of neutrals, is immaterial as between the parties to a contract of insurance. The effect is the same whether the blockade is or is not authorized by the laws of war, because the danger to the assured is the same and arises from the same cause,—the act of one of the powers at war. *Richardson* v. *Maine F. & M. Ins. Co.* (1809) 6 Mass. 102, 4 Am. Dec. 92.

An insurance "against all risks, blockaded ports excepted," nevertheless covers a vessel sailing ignorantly for a blockaded port, the exception being, not of the port, but of the risk of capture for breaking the blockade, and a vessel sailing in ignorance of the blockade not being liable to capture by the law of nations. *Yeaton* v. *Fry* (1809) 5 Cranch, 335, 3 L. ed. 117.

A clause in a policy of marine insurance that "the insurers take no risk of a blockaded port, but if turned away the assured to be at liberty to proceed to a port not blockaded," extends to every loss happening by reason of a blockaded port, and the court cannot inquire whether the belligerent was strictly justifiable in condemning the property insured for a violation of the blockade. *Radcliff* v. *United Ins. Co.* (1810) 7 Johns. 38, s. c. on subsequent appeal, 9 Johns. 277.

A clause in a policy of insurance on freight that "the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised," does not, where a blockade is one of the risks not taken by the insurer, authorize the insured to break up the voyage from an apprehension that the cargo may be injured by hot weather while waiting for the raising of the blockade. *Marks* v. *Louisiana State M. & F. Ins. Co.* (1843) 3 Rob. (La.) 454.

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b. Interdiction.

If the port of destination has been absolutely interdicted so that the prosecution of the voyage to its conclusion has become impracticable, or been attended with a moral certainty of danger and loss, it will be considered as equivalent to the existence of a *vis major* in breaking up the voyage. *Craig* v. *United Ins. Co.* (1810) 6 Johns. 226, 5 Am. Dec. 222.

In *Sanday* v. *British & F. M. Ins. Co.* [1915] 2 K. B. 781, 31 Times L. R. 374, 84 L. J. K. B. N. S. 1625, [1915] W. N. 185, 59 Sol. Jo. 456, where a cargo in a British ship *en route* to Germany, and contracted to be sold to Germans, was, upon the breaking out of war between Germany and Great Britain and the issuance of a proclamation prohibiting trading with the enemy, diverted to a British port, it was held that, the further prosecution of the voyage having become illegal, there was a constructive total loss covered by the words, "arrests, restraints, and detainments of all Kings, princes, or people of every nation, Kingdom, or quality whatsoever," in a policy of marine insurance thereon, though no force or violence was exerted. Swinfen Eady, L. J., however, dissented upon the ground that to constitute an arrest, restraint, or detainment within the meaning of the phrase as used in policies of marine insurance, it is essential that force should be actually present and ready to be immediately exercised if obedience be not accorded without its being actually exerted. The Law Journal (issue of May 1, 1915), in commenting editorially upon this decision said that while it seems to be a reasonable application of the principle that the insurance of goods is also an insurance of the adventure of bringing them to their destination, it is not altogether consistent with the series of cases decided at the beginning of the 19th century, of which *Hadkinson* v. *Robinson* (1803) 3 Bos. & P. 388, 7 Revised Rep. 786, is a good example, in which the courts invariably held that when the voyage was abandoned owing to an interdiction of commerce with the port of destination by reason of a blockade or embargo, the insured could not recover because the peril had not acted directly upon the property insured.

Any doubt as to the ultimate attitude of the English courts on the subject has, however, been set at rest by the affirmance of the foregoing decision by the House of Lords in *British & Foreign Marine Ins. Co.* v. *Sanday* (1916) 32 Times L. R. 266, in which *Hadkinson* v. *Robinson, supra,* is expressly distinguished. Lord Atkinson said: "The cases of *Hadkinson* v. *Robinson* (3 B. and P. 388) and *Lubbock* v. *Raycroft* (5 Esp. 50) are distinguishable from the present. In each of these cases the only deterrent was the risk of ultimate capture if the ships proceeded to their destination. The

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vessels prudently resolved not to incur that risk, but to avoid it. In the present case the deterrents were the penalties incurred by the violation of the criminal law. This was present and immediate, if the ship proceeded at all towards her destination with a view of trading with the enemy. Actual capture was in those cases the peril insured against. The apprehension of capture is an entirely different thing, and was not insured against." And Lord Wrenbury said: "*Hadkinson* v. *Robinson* (3 Bos. and Pul. 388) and *Kachianoff* v. *China Traders' Company* (29 The Times L. R. 642, 30 The Times L. R. 546; [1913] 3 K. B. 407; [1914] 3 K. B. 1, 121) are not in point. The adventure there remained legal. All that happened was that, in pursuit of a lawful adventure, the master did not go into a position of peril. He never was restrained. His own country did not restrain him, and he took care not to put himself in danger of being restrained by another country. Illegality according to the law of another country does not affect the merchant. In the present case the adventure was illegal according to the law of the country of the owner of the goods. And it was the declaration of war that made it illegal."

Where, after a vessel has set out on its voyage, the port of destination is captured by belligerent, who refuses to permit the landing of the cargo, the insurer of the freight is not liable, the freight having been earned. *Morgan* v. *Insurance Co. of N. A.* (1806) 4 Dall. 455, 1 L. ed. 907.

An exemption in a policy of marine insurance from any loss or expense arising from the violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce does not exonerate the underwriters from a loss arising from a violation of a decree of one of the belligerents made after the execution of the policy. *Wood* v. *New England M. Ins. Co.* (1817) 14 Mass. 31, 7 Am. Dec. 182.

A nonintercourse act is not violated where a vessel is driven by distress into a port of the country with which intercourse is forbidden and a part of her cargo taken by the officers of the government, and she purchases and loads with the produce of the country. *Jenks* v. *Hallet* (1803) 1 Caines, 60, affirmed in 1 Cai. Cas. 43.

c. Embargo.

Insurance on a ship and stores "at and from" a certain port, against, *inter alia,* restraints and detainments, extends to an embargo at the loading port. *Rotch* v. *Edie* (1795) 6 T. R. 413, 3 Revised Rep. 222.

A vague rumor, or knowledge by the pilot, of an embargo, is not sufficient to charge the insured with a knowledge of the act laying the

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embargo, so as to render the commencement of the voyage illegal. *Walden* v. *Phœnix Ins. Co.* (1810) 5 Johns. 310, 4 Am. Dec. 359.

A domestic as well as a foreign embargo amounts to an arrest, restraint, or detainment within the meaning of a policy of marine insurance. *Odlin* v. *Insurance Co. of Pennsylvania* (1808) 2 Wash. C. C. 312, Fed. Cas. No. 10,433; *Lorent* v. *South Carolina Ins. Co.* (1815) 1 Nott & M'C. 505; *Delano* v. *Bedford M. Ins. Co.* (1813) 10 Mass. 347, 6 Am. Dec. 132 (*obiter*). In *Walden* v. *Phœnix Ins. Co. supra,* the argument that as the insured were citizens of the United States, they must be considered as parties to and assenting to the act of Congress laying the embargo, and cannot therefore take advantage of their own act or default, was said by Kent, Ch. J., to be too fanciful to be allowed any weight.

Insurance against loss occasioned by "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever," covers a seizure of the ship in consequence of an embargo laid on her by the sovereign of the country of the assured for the purpose of carrying on war with another power, although, it seems, it would not do so if the war was between the countries of the insurer and the assured. *Aubert* v. *Gray* (1861) 3 Best & S. 169, 32 L. J. Q. B. N. S. 50, 9 Jur. N. S. 714, 7 L. T. N. S. 469, 11 Week. Rep. 27, 14 Eng. Rul. Cas. 139.

An embargo imposed by the government to which the insurer and insured belonged, subsequently to the commencement of the risk, furnishes a legal ground of abandonment. *Odlin* v. *Insurance Co. of Pennsylvania* (1808) 2 Wash. C. C. 312, Fed. Cas. No. 10,433; *McBride* v. *Marine Ins. Co.* (1810) 5 Johns. 299; *Lorent* v. *South Carolina Ins. Co.* (1815) 1 Nott & M'C. 505; *Ogden* v. *New York F. Ins. Co.* (1813) 10 Johns. 177, affirmed in 12 Johns. 25.

Where a vessel is insured against capture or detention, with the stipulation that the insurers "should pay a total loss thirty days after receipt of official news of capture or embargo without waiting for condemnation," and is detained by an embargo in a foreign port, the right of the insured to claim for a total loss becomes vested on the expiration of the thirty days, notwithstanding the vessel has never been taken out of the possession of the captain. *Fowler* v. *English & S. M. Ins. Co.* (1865) 18 C. B. N. S. 818, 34 L. J. C. P. N. S. 253, 11 Jur. N. S. 411, 12 L. T. N. S. 381, 13 Week. Rep. 658.

X. *Hostilities as proximate cause of loss.*

See also in this connection the note to *Andersen* v. *Marten, post,* 66.

The insurer of cargo is not liable for an abandonment of the voyage occasioned by news that the port of destination has fallen into

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the hands of the enemy. *Lubbock* v. *Rowcroft* (1803) 5 Esp. 50, 8 Revised Rep. 830.

But a loss accruing to the owner of a cargo insured, in consequence of its diversion to British ports upon the breaking out of war between England and Germany, is proximately caused by "restraints of all kings, princes, and people of what nation soever" within the meaning of a policy of marine insurance. *British & Foreign Marine Ins. Co.* v. *Sanday* (1916) 32 Times L. R. 266.

Where a vessel is destroyed in consequence of the order of a military commander to burn all the cotton in and about the city to prevent it from falling into the hands of opposing forces about to capture the city, the loss is within a clause of the policy exempting the insurer from "all claim for loss or damage arising from or growing out of the collision of foreign powers or of our government with others." *Marcy* v. *Merchants' Mut. Ins. Co.* (1867) 19 La. Ann. 388.

In *Ionides* v. *Universal M. Ins. Co.* (1863) 14 C. B. N. S. 259, 32 L. J. C. P. N. S. 170, 10 Jur. N. S. 18, 8 L. T. N. S. 705, 11 Week. Rep. 858, 14 Eng. Rul. Cas. 271, a cargo was insured by a policy containing a warranty "free from capture, seizure, and detention, and all the consequences thereof or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions." During the voyage, the master of the vessel, being out of his reckoning and supposing that he had passed Cape Hatteras, changed his course and was wrecked off Hatteras inlet. It appeared that the light in the Cape Hatteras lighthouse, which in ordinary weather would have been visible to the captain, has been extinguished by order of the Confederate government for the purpose of harassing the Federal shipping. The following morning two Confederate officers came on board, took possession of the ship, and carried the officers and crew on shore, where they were detained as prisoners. An attempt was made by salvors to take off the cargo, but their efforts were interfered with by the Confederate troops, who would not allow them to proceed unless they would consent to save the goods for them. The weather subsequently becoming very boisterous, the vessel broke up and the whole of the cargo remaining on board was lost. Upon these facts it was held that the captain having lost his reckoning, and either not keeping sufficient lookout or not lying to when his position was doubtful, and so running on shore, it could not be said that the absence of the light was proximately the cause of the loss so as to bring the loss within the exception contained in the warranty against the "consequences of hostilities," and therefore that, except for so much of the cargo as had been saved or which might might have been saved by the salvors had not the Confederate troops interfered, the insurer was liable.

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In *Andersen* v. *Marten* [1907] 2 K. B. 248, 76 L. J. K. B. N. S. 674, 97 L. T. N. S. 375, 23 Times L. R. 534, 12 Com. Cas. 309, the opinion was expressed that the loss of a vessel by shipwreck while proceeding to port under the direction of a prize master was not a "consequence of hostilities" within the meaning of a provision in the policy exonerating the insurer.

In *Hagedorn* v. *Whitmore* (1815) 1 Starkie, 157, an action on a policy of insurance on goods carried on a merchant ship, which, falling in with a British ship of war, was arrested and taken in tow, rendering it necessary, in order to keep up, to use an extraordinary press of sail, in consequence of which the vessel shipped a quantity of water, whereby the insured goods were damaged, it was contended that the loss was not within the terms of the policy, being attributable to the conduct of the captain of the ship of war, but it was held that this was not the proximate cause of the damage, and that the insurer was liable.

The detention of a British ship by a British man-of-war for several days, in apprehension of hostilities, is not the effective cause of the loss of a voyage where the ship is afterward turned back because of a hostile embargo in the port of destination, though if the ship had not been detained in the first instance she would have arrived in time to have delivered her cargo before the embargo. *Forster* v. *Christie* (1809) 11 East, 205, 10 Revised Rep. 470.

The loss of a quantity of dollars which the captain of a ship about to be attacked throws overboard to prevent their falling into the hands of the enemy is covered by a policy describing the perils insured against to be "of the seas, men-of-war, fire, enemies, pirates, rovers, jettison, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, and damage of the said goods and merchandises," it being a loss by "enemies" or by jettison, or, if not, strictly speaking, by jettison, something *ejusdem generis*, and therefore within the general words, "all other losses or misfortunes." *Butler* v. *Wildman* (1820) 3 Barn. & Ald. 398, 22 Revised Rep. 435.

The act of a government in taking possession of gold in transit in anticipation of the outbreak of war is an act which comes under the words, "consequences of warlike operations whether before or after the declaration of war," as used in a warranty clause exempting the insurer in such case from liability. *Robinson Gold Min. Co.* v. *Alliance Ins. Co.* [1902] 2 K. B. 489, 71 L. J. K. B. N. S. 942, 51 Week. Rep. 105, 86 L. T. N. S. 858, 18 Times L. R. 732, 7 Com. Cas. 219, per Collins, M. R.; affirmed without discussion of this

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point in [1904] A. C. 359, 73 L. J. K. B. N. S. 898, 91 L. T. N. S. 202, 20 Times L. R. 645, 53 Week. Rep. 160, 9 Com. Cas. 301.

Where a ship to avoid seizure runs to sea before it is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss by shipwreck. *O'Reilly* v. *Gonne* (1815) 4 Campb. 249, 16 Revised Rep. 788.

But the insurer is not liable under the circumstances above detailed where the policy contains a warranty against capture and seizure in port. *O'Reilly* v. *Royal Exch. Assurance* (1815) 4 Campb. 246, 16 Revised Rep. 786.

Where a vessel insured under a policy which provides that the insurer takes no risk in port but sea risk is, while lying in port, forced from her moorings in a violent gale and driven ashore in a place where she could not have been got off unless at an expense exceeding half her value if at all, there was a total loss by perils of the sea for which the insurer was liable, notwithstanding she was thereafter forcibly taken possession of by the forces of a belligerent and burned. *Patrick* v. *Commercial Ins. Co.* (1814) 11 Johns. 9.

But the loss of the cargo under the circumstances above detailed is not a loss for which the insurer is responsible, there being no evidence that it was injured by the stranding of the vessel, and had not the ship been captured and burned it might have been removed in safety. *Patrick* v. *Commercial Ins. Co.* (1814) 11 Johns. 14.

XI. What constitutes seizure or detention in port.

In consequence of the arbitrary actions of the opposing belligerents during the Napoleonic Wars, it became customary for insurers to stipulate against liability for seizure or detention in port. The meaning of such stipulation came under construction in the following cases:

A vessel seized while lying to under the lee of an island about a league from shore and distant about 30 miles from her port of destination is not "in port" within the provision in a policy of insurance warranting the vessel "free from seizure or detention in port." *Watson* v. *Marine Ins. Co.* (1810) 7 Johns. 57.

In *Duval* v. *Commercial Ins. Co.* (1813) 10 Johns. 278, it was held that a vessel which, when about 2 leagues from land and about 4 leagues from her destination, was boarded by an armed launch, and a prize master and crew put on board, who took the vessel into another port, and which was subsequently sent to still another port, where the cargo was sequestered and afterward landed by order of the government and put in the public stores, it was held that the loss was by capture, and not by "seizure in port," within a clause exempting the insurer of the cargo from liability for such seizure.

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XII. Extent of liability; right to abandon to insurer and recover as for total loss.

a. In general.

Assuming, or having determined, the existence of a liability on the part of the insurer for a loss arising out of a state of war, the further question arises whether the assured may convert the loss into a total one by an offer to abandon to the insurer. This brings in its train a number of subsidiary questions, such as the time within which the offer must be made; the effect of a restitution or recapture, or of a bidding in of the insured property at a sale under a decree of the admiralty court; and the construction of various stipulations of the policy relative to abandonment. These will now be considered.

In *Lozano* v. *Janson* (1859) 2 El. & El. 160, 28 L. J. Q. B. N. S. 337, 5 Jur. N. S. 1401, 7 Week. Rep. 654, it was said that it has often been held that if the ultimate consequence of a peril insured against is merely the loss of a voyage or a suspension or retardation of a mercantile adventure, although notice of abandonment has been justifiably given, a total loss cannot be claimed; but that the mere existence of the ship or goods insured after a total loss and abandonment, so that possession of them may possibly be resumed by the owner, will not reduce it to a partial loss.

In accordance with this principle, that the possibility of recovery of the property insured will not prevent a loss from a peril insured against from being a total one, it has frequently been held that capture is so far a total loss as to justify an abandonment. See *Queen* v. *Union Ins. Co.* (1808) 2 Wash. C. C. 331, Fed. Cas. No. 11,505; *Duval* v. *Commercial Ins. Co.* (1813) 10 Johns. 278; and cases cited throughout this section. Proof that the vessel was captured is sufficient evidence of a total loss, and it is not necessary to show condemnation (*Ruan* v. *Gardner* (1804) 1 Wash. C. C. 145, Fed. Cas. No. 12,100); or to make any claim or appeal before calling on the underwriters (*Tyson* v. *Gurney* (1789) 3 T. R. 477).

After capture and abandonment the master of the vessel and his agents are the agents of the underwriter, and not of the insured. *Lovering* v. *Mercantile M. Ins. Co.* (1832) 12 Pick. 348.

A "sue and labor" clause does not affect right to abandon on capture, and does not impose upon the insured the duty of making a claim or appealing from a decree of condemnation. By abandoning and calling on the insurers the insured yields up to them all his right, title, and interest in the subject insured, and it operates in judgment of law as a transfer of the property, and the captain from that time becomes the agent of the insurers. *Gardere* v. *Columbia Ins. Co.* (1811) 7 Johns. 514.

Where a cargo is captured and carried into a port from which it

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may not be removed without security being given not to carry it to a port of the opposing belligerent, this is a complete destruction of the original voyage, giving the insured the right to abandon. *Hurtin* v. *Phœnix Ins. Co.* (1806) 1 Wash. C. C. 400, Fed. Cas. No. 6,941.

But the owner of a vessel cannot abandon her to the insurer because the voyage has been broken up by a seizure of the cargo, the contract being for the ability of the ship to perform the voyage, and not that she shall perform it at all events. *Alexander* v. *Baltimore Ins. Co.* (1808) 4 Cranch, 370, 2 L. ed. 650.

In *Polurrian S. S. Co.* v. *Young* (1914) 109 L. T. N. S. 901, 30 Times L. R. 126, 12 Asp. Mar. L. Cas. 449, 19 Com. Cas. 143, where a vessel insured against capture and detention was stopped by the naval forces of a belligerent, her cargo of coal confiscated for the use of the belligerent fleet, and the vessel detained for six weeks, it was held that the circumstances did not warrant an abandonment to the insurer, there being neither an actual total loss of the vessel at the time of notice of abandonment, as the owners were not then "irretrievably deprived" of the ship within the meaning of § 57 (1) of the English marine insurance act 1906, nor a constructive total loss within the meaning of § 60 (2) of that act, it not being "unlikely that he can recover the ship." This conclusion was affirmed by the court of appeal in [1915] 1 K. B. 922, 84 L. J. K. B. N. S. 1026, 20 Com. Cas. 152, 111 L. T. N. S. 1053, [1915] W. N. 68, 31 Times L. R. 211, 59 Sol. Jo. 285, where, however, it was said that if the action had come to be decided before the Marine Insurance Act 1906 had come into force, the plaintiffs would have been held to have been entitled to recover upon the policy of insurance as for a constructive total loss. The court said: "According to the law as it stood before the passing of that act, the seizure or arrest or detention of a vessel for that which is either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by Arnould on Marine Insurance, 9th ed. vol. 11, § 1108, from Emerigon, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner's action to enforce his notice of abandonment, a taking which still continued in operation, and the owner's loss of the use and disposal of the ship, once total, was at that date one which might be permanent, and was, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss."

In *British & Foreign Marine Ins. Co.* v. *Sanday* (1916) 32 Times L. R. 266, where a cargo *en route* to Germany prior to the outbreak of war between England and Germany, insured, *inter alia*, against

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restraints of all kings, princes, and people of what nation soever, was, in consequence of the breaking out of the war and the ensuing prohibition of trade with the enemy, diverted to British ports, it was held that there was a constructive total loss entitling the insured to abandon to the underwriters.

In *Wilson Bros. B. & Co.* v. *Green* (1915) 31 Times L. R. 605, it was held that under the Marine Insurance Act 1906, the owners of a cargo of timber insured against war risks (excluding all claims arising from delay) on a voyage from a Baltic to an English port, could not abandon and recover as for a constructive total loss, where at the date when the notice of abandonment was given the vessel was lying in a Danish port to which it had proceeded in consequence of having been stopped by a German torpedo boat and forbidden to pass the Sound in consequence of the contraband character of its cargo, but was given permission to go either into a Swedish or Danish port in the Baltic, it appearing that the master of the vessel, finding it dangerous in consequence of stormy weather to remain at his anchorage and seeing no German torpedo boat about, made for the Sound and finally proceeded to a Norwegian port where he discharged his cargo, and that the Norwegian government never placed any obstacle in the way of a reshipment of the cargo for England; the plaintiffs never having been deprived of the possession of the goods so as to bring the case within § 60, subs. 1, and the event showing that at the date of the abandonment it could not be said that the total loss of the venture was unavoidable so as to bring the case within subs. 2.

Where a vessel, with her freight and cargo, insured for a certain voyage, with liberty to proceed to another port should the port of destination be blockaded, is constrained by the blockading force to go to a port other than that designated in the instructions given to the captain, the insured may abandon cargo and freight and recover as for a total loss. *Symonds* v. *Union Ins. Co.* (1806) 4 Dall. 417, 1 L. ed. 890, Fed. Cas. No. 13,715.

The impossibility of prosecuting the voyage to the place of destination in consequence of a blockade having been declared, which arose during and in consequence of the prolonged detention of the ship and cargo in a British port, may be considered as a loss of the voyage warranting the assured in abandoning. *Barker* v. *Blakes* (1808) 9 East, 283.

If the port to which a vessel is destined be actually blockaded, the insured may abandon as for a total loss, and the acceptance of the goods at another port by the consignee, after the abandonment, under the circumstances of the case and from necessity, is an act done for the benefit of all concerned, and does not relieve the insurer. *Schmidt* v. *United Ins. Co.* (1806) 1 Johns. 249, 3 Am. Dec. 319.

But where a policy permits a ship to proceed to a neighboring

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port in case of being turned off on account of blockade, the owners cannot avail themselves of the policy in order to get their property into port, and having arrived there consider the voyage as broken up and throw the cargo on the underwriters. *Ferguson* v. *Phœnix Ins. Co.* (1813) 5 Binn. 544.

Where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enters the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. *Hadkinson* v. *Robinson* (1803) 3 Bos. & P. 388, 7 Revised Rep. 786.

And where a vessel engaged in a filibustering expedition is chased away by government ships before she can land her cargo, and, subsequently returning, finds that the port has passed into the hands of the government, so that if she enters it her cargo will be subject to confiscation, and accordingly returns home, the insured cannot abandon the cargo to the underwriters and recover as for constructive total loss, the fear of confiscation, and not the restraint temporarily imposed by the presence of the governments ships, being the cause of the breaking up of the voyage. *Smith* v. *Universal Ins. Co.* (1821) 6 Wheat. 176, 5 L. ed. 235.

b. Time for abandonment.

In the case of loss occasioned by other perils, it is a general rule that the assured must offer to abandon within a reasonable time, and may not speculate upon his chances. This is in order that the insurer may not be prejudiced by the delay, and may take immediate steps for the preservation of such of the property insured as may remain in existence. The rule was at first held to apply in the case of loss by capture (see cases *infra*); but has since, in some jurisdictions at least, been relaxed so as to allow of an abandonment at any time while the loss continues total, the situation being different from that of a loss by sea perils.

As above stated, it has sometimes been held, on the one hand, that if in a reasonable time after notice of capture the insured fails to abandon, he loses the privilege of doing so, and cannot recover for a total loss on any abandonment for that cause subsequently made (*Maryland Ins. Co.* v. *Bathurst* [1833] 5 Gill & J. 159); on the other hand, that it is not necessary for the assured to elect whether to abandon or not upon receiving intelligence of the capture of his property, but that he may do so at any time while the loss continues total (*Bohlen* v. *Delaware Ins. Co.* [1812] 4 Binn. 430; *Brown* v. *Phœnix Ins. Co.* [1812] 4 Binn. 445).

While the insured may abandon upon learning of capture, it does

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not follow that he is bound in all cases to do so immediately after the capture, for it is to the advantage of trade that this right should remain and continue until all prospects of regaining or getting back the property are at an end: "Otherwise it would check and put a stop to all those laudable endeavors which honest and faithful men have been in the constant exercise of in all parts of the world where captures are made, in order to reclaim and obtain a restitution of ships and cargoes; and if the pursuit of those endeavors were to be the means of debarring men of their right of eventually abandoning the property to the insurers, very few, if any, would give themselves any trouble about it afterwards." *Mey* v. *Tunno* (1801) 2 Bay, 307.

A hostile detention is not determined by a delivery of the vessel on bail in the course of proceedings against her as prize, although the vessel is ultimately restored. *Lovering* v. *Mercantile M. Ins. Co.* (1832) 12 Pick. 348.

An abandonment is not made in due time where notice thereof is not given until more than five weeks after a blockade of the port of destination has been publicly notified, although it was not known to the agents of the assured that the vessel and cargo, which had been detained by the British, had been ordered restored. *Barker* v. *Blakes* (1808) 9 East, 283.

Although the right to abandon continues during detention, it must be seasonably exercised, and, if not so exercised, will be deemed to have been waived. *Livermore* v. *Newburyport M. Ins. Co.* (1804) 1 Mass. 264.

Where the insured received information on October 17th, of the capture by the English of his vessel while on a voyage to France, and on the 16th of November intelligence was received of a peace concluded between Great Britain and France, and the insured first offered to abandon on the 20th of November, the delay of the insured in point of time was unreasonable and a waiver of his right; and the change of circumstances intervening after his knowledge of the event which entitled him to abandon, and before his undertaking to exercise that right, gave the insurer a just right to reject the abandonment. *Ibid.*

A delay of nearly two and one-half months is held in *Savage* v. *Pleasants* (1813) 5 Binn. 403, 6 Am. Dec. 424, to be fatal to a right to abandon and recover as for a total loss in consequence of the breaking up of the voyage insured, where the goods covered by the policy remained safe.

But an abandonment by the insured six months after receiving information of the seizure and detention of his vessel for a cause which he knew did not exist has been held to have been made within a reasonable time, where, after learning of the condemnation of the

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vessel, he immediately offered to abandon. *Dorr* v. *Union Ins. Co.* (1812) 8 Mass. 494.

Where upon capture the owner of the goods insured does not abandon, and the goods are, in consequence of deterioration, ordered sold pending an appeal from a decree of restitution, he may, upon abandoning the proceeds to the insurer, recover as for a total loss. *Stringer* v. *English & S. M. Ins. Co.* (1870) L. R. 5 Q. B. 599, 10 Best & S. 770, 34 L. J. Q. B. N. S. 214, 22 L. T. N. S. 802, 18 Week. Rep. 1201.

In *Watson* v. *Insurance Co. of N. A.* (1803) 1 Binn. 47, it was held that one whose property had been captured and condemned, but who had not seasonably abandoned to the underwriters, might nevertheless recover as a partial loss the whole sum insured less the value of the *spes recuperandi,* which Shippen, Ch. J., said existed after the condemnation, because there was a chance for reversal of the sentence. In reply to the contention that the value of the *spes recuperandi* was not susceptible of computation, it was said: "It is true this benefit is not so easily calculated as where goods are saved and sold, but the principle is the same; and where the jury from the circumstances of the case, and from their experience of the strength of the respective belligerent powers, and the probable injustice of the condemnation, have any data to calculate the chance of recovering back the property, and can reduce it to a fractional part of the sum insured, I see no reason why the value of that chance may not be deducted from the sum insured, and the assured recover the remainder from the underwriters, as in the case of common average losses; for it is only the value of the thing neglected to be ceded which forms a deduction in any case of loss, from the sum insured." This decision is said to have been due to a desire to escape from the consequences of a rule adopted in some cases that the insured must abandon within a reasonable time after learning of the capture, or not at all, and has not been regarded as satisfactory.

In *Gracie* v. *New York Ins. Co.* (1811) 8 Johns. 237, Kent, Ch. J., said that he could not assent to what was said in the foregoing case as to the deduction of the value of the *spes recuperandi* from the recovery, "for a jury is wholly incompetent to calculate that value. There is no possible rule of computation. Where any part of the property exists in specie a jury may have a rule to go by, as when a vessel is stranded and is still alive, but it would be perfectly arbitrary to undertake to estimate the worth of such a hope in this case."

In *Brown* v. *Phœnix Ins. Co.* (1812) 4 Binn. 445, Tilghman, Ch. J., said with reference to *Watson* v. *Insurance Co. of N. A.* that he did not consider the law as settled by that decision. "The court was not unanimous. It was not acquiesced in by the bar, and would have been carried to the court of errors and appeals, had the nature of the

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case admitted it. But being a determination on a case stated, it was supposed that it could not be carried up by writ of error. There certainly are some weighty objections to the principle adopted by the court in that case. It takes away the necessity of abandonment in any case whatever, without affording sufficient protection to the rights of the underwriter; because instead of paying for the whole loss, and receiving an assignment of the whole chance of recovery, he is compelled to relinquish that chance, and may have to pay the whole loss, deducting a trifling sum for the value of the chance. Besides, there seems an impropriety in proving a total loss and recovering for less than a total loss. There will be great difficulty, too, in reducing the rule to practice; for by what standard are the jury to estimate the hope of recovery? It depends not on any known principles of law or justice, but frequently on the character, the temper, the caprice of the prince, or on secret political motives."

c. Effect of recapture or restitution.

1. As terminating right to abandon on ground of capture.

The right to abandon because of capture is terminated where news has been received that the vessel has been released and has proceeded on her voyage. *De Peau* v. *Russell* (1804) 1 Brev. 441, 2 Am. Dec. 676.

The insured cannot abandon after the vessel has been recaptured and reached her destination, the underwriters being liable only for the amount of the salvage and the damage sustained under the policy. *Muir* v. *United Ins. Co.* (1803) 1 Caines, 49.

The right of the insured to abandon and recover for a total loss depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received. *Rhinelander* v. *Insurance Co. of Pa.* [1807] 4 Cranch, 29, 2 L. ed. 540; *Marshall* v. *Delaware Ins. Co.* [1808] 4 Cranch, 202, 2 L. ed. 596; *Alexander* v. *Baltimore Ins. Co.* [1808] 4 Cranch, 370, 2 L. ed. 650; *Adams* v. *Delaware Ins. Co.* [1811] 3 Binn. 287. The fact of restoration, though unknown at the time of abandoning, terminates the right to abandon and claim for total loss. (*Church* v. *Bedient* [1804] 1 Cai. Cas. 21; *Hallett* v. *Peyton* [1804] 1 Cai. Cas. 28 [overruling *Mumford* v. *Church* (1799) 1 Johns. Cas. 147; *Slocum* v. *United Ins. Co.* (1799) 1 Johns. Cas. 151; *Murray* v. *United Ins. Co.* (1801) 2 Johns. Cas. 263; *Livingston* v. *Hastie* (1803) 3 Johns. Cas. 293].) The insurer is not bound to accept an abandonment, although promptly made by the assured upon hearing of the seizure, where at the time of the abandonment the property had been restored to the agent of the owner. (*Dorr* v. *Union Ins. Co.* [1812] 8 Mass. 502.) So, a total loss arising from capture may be turned into a partial loss

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by a recapture, though not known to the assured at the time of abandonment. *Bainbridge* v. *Neilson* (1808) 10 East, 329, 1 Campb. 237, 10 Revised Rep. 316, 1 Eng. Rul. Cas. 121. Upon this point it was said by Le Blanc, J.: "The main stress of the plaintiff's argument has been that at the time of the notice of abandonment he had a right to abandon. But there is the fallacy of it. It does not follow that he had a right to abandon because he had a right to give notice of abandonment upon the faith of the intelligence first received. At the time of the capture he had a right to give such notice; but at the time when the notice was actually given, the ship had been recaptured and was carried into Lock Swilley in Ireland, a port of the United Kingdom, in the course of her voyage home; and there is no evidence of any damage sustained either by plunder of or by mischief done to the ship, cargo, or crew, which could make it a total loss. It is impossible, then, to say that the want of knowledge by the assured of the true state of things shall vary the fact, and make that a total loss which is only a partial loss."

An abandonment after acquittal, but before actual restitution, is too late. *Adams* v. *Delaware Ins. Co.* [1811] 3 Binn. 287. The technical total loss arising from capture ceases with a final decree of restitution, from which no appeal lies, although the decree may not have been executed at the time of the offer to abandon. *Marshall* v. *Delaware Ins. Co.* [1808] 4 Cranch, 202, 2 L. ed. 596. On this point it was said by Marshall, Ch. J., in the case last cited: "When a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue as from that time to break up the voyage. There is no reason to presume a subsequent detention on the part of the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually determined, the court cannot consider it as continuing after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor."

The foregoing cases overrule an earlier decision (*Dutilh* v. *Gatliff* [1806] 4 Dall. 446, 1 L. ed. 903) that where a captured vessel is abandoned after a decree of restitution, but before actual restitution, and without knowledge of the decree, the assured may recover as for a total loss.

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It is not too late to elect to abandon after a decree of restitution where the captors have appealed therefrom. *Mey* v. *Tunno* [1801] 2 Bay, 307. While the case remains open to an appeal, and the property is held by the captor, the peril cannot be said to be over; but when no appeal lies and the party is in possession of an order for restitution, there is a reasonable presumption that the property will be immediately restored. *Adams* v. *Delaware Ins. Co. supra.*

2. Effect upon abandonment already made.

The English and American courts differ as to the time within which the constructive total loss occasioned by capture or detention is liable to be converted into a partial loss by recapture or restitution; the American courts holding the rights of the parties to be fixed as of the time of abandonment, while the English courts hold that the rights of the parties are governed by the situation existing at the moment of bringing suit. The reasoning of the English courts is that as the contract is one of indemnity only, the assured should not be permitted to recover as for a total loss when he may be indemnified by recovering for a partial loss.

Thus, it has been variously stated that an abandonment once duly made is not affected by a restoration (*Bordes* v. *Hallet* [1803] 1 Caines, 144); that unless the subject of insurance is released or restored before abandonment the rights of the parties are fixed (*Duval* v. *Commercial Ins. Co.* [1813] 10 Johns. 278); that a capture as prize will authorize the insured to abandon as soon as he has notice of that fact, provided the loss continues up to the time when the abandonment is made (*Queen* v. *Union Ins. Co.* [1808] 2 Wash. C. C. 331, Fed. Cas. No. 11,505); and that the owner of a vessel who abandons it to the insurer upon hearing that she has been captured and libeled as prize is entitled to recover as for a constructive total loss, though the ship and cargo are afterward restored (*Lee* v. *Boardman* [1807] 3 Mass. 238, 3 Am. Dec. 134).

But in *Smith* v. *Touro* (1817) 14 Mass. 112, it was held that where the detention was only temporary, and it did not appear that the vessel sustained any damage while in the possession of the enemy, the insured was not entitled to recover for a total loss though he had abandoned to the insurers when the ship was in the hands of the captors.

The right to recover as for a total loss by capture is not affected by the fact that by the terms of the policy the loss was not payable until sixty days after notice thereof, and that before that time the property was restored. *Munson* v. *New England M. Ins. Co.* (1808) 4 Mass. 88.

An insurer contracting "to pay a total loss thirty days after receipt of official news of capture or embargo without waiting for

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condemnation" is liable to pay for a total loss (the ship having been duly abandoned to the insurer) thirty days after the receipt of news of the embargo, although the embargo is subsequently removed and the ship arrives safe at her port of destination. *Fowler* v. *English & S. M. Ins. Co.* (1865) 18 C. B. N. S. 818, 34 L. J. C. P. N. S. 253, 11 Jur. N. S. 411, 12 L. T. N. S. 381, 13 Week. Rep. 658.

In England, as above stated, it is held that abandonment does not entitle the insured to recover where in the meantime there has been a rescue and the goods insured brought back home (*Naylor* v. *Taylor* (1829) 9 Barn. & C. 718, 4 Moody & R. 526); though the Scottish courts have held otherwise (see *Smith* v. *Robertson* (1814) 2 Dow, 474, 14 Revised Rep. 174, where the judgment of the court of session was affirmed by the House of Lords on the ground that the abandonment had been accepted by the underwriters).

But the return of the ship by the captors after the commencement of an action on the policy does not disentitle the owners to recover as for a total loss. *Ruys* v. *Royal Exch. Assur. Corp.* [1897] 2 Q. B. 135, 77 L. T. N. S. 23, 66 L. J. Q. B. N. S. 534, 8 Asp. Mar. L. Cas. 294; *Polurrian S. S. Co.* v. *Young* [1915] 1 K. B. 922, 84 L. J. K. B. N. S. 1026, 20 Com. Cas. 152, 112 L. T. N. S. 1053, [1915] W. N. 68, 31 Times L. R. 211, 59 Sol. Jo. 285.

d. Right to abandon for loss arising out of capture.

Although recapture or restitution will terminate the right to abandon because of capture, and will in England (as above stated) prevent an abandonment previously made from serving as a foundation for a recovery of a total loss, it does not follow that the loss resulting from the capture may not of itself warrant an abandonment.

It is immaterial as between the insurer and the insured whether by the capture the property was or was not transferred to the enemy by the law of nations, and the insured may therefore abandon the property to the insurer after capture, though it be retaken before condemnation. *Goss* v. *Withers* (1758) 2 Burr. 683, 2 Ld. Kenyon, 325, 1 Eng. Rul. Cas. 1. In this case Lord Mansfield said: "The loss and disability was in its nature total at the time it happened. During eight days, the plaintiff was certainly entitled to be paid by the insurer as for a total loss; and in the case of a recapture, the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part; half the value must be paid for salvage. The disability to the voyage still continued. The master and mariners were prisoners. The charter party was dissolved. The freight (except in proportion to the goods saved) was lost. The ship was necessarily brought into an English port. What could be saved might not be worth the expense attending it (which is proved by the plaintiff's offer to abandon). The subsequent title to restitution arising

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from the recapture, at a great expense, of the ship disabled to pursue her voyage, cannot take away a right vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved."

So, also, in *Hamilton* v. *Mendes* (1761) 2 Burr. 1198, 1 Eng. Rul. Cas. 112, Lord Mansfield said that it does not necessarily follow that because there is a recapture therefore the loss ceases to be total. "If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success,—under these and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding there has been a recapture."

The insured cannot abandon on the ground of capture alone if he does not abandon before he hears of the restoration, but a restoration does not always deprive the insured of a right to abandon, for if in consequence of capture the voyage is broken up, or not worth pursuing, he may abandon. *Messionier* v. *Union Ins. Co.* (1818) 1 Nott & M'C. 155.

Where a ship insured for three months under a policy extending to captures is captured, but before being carried *infra præsidia hostis* is retaken, and it is found that she has been disabled from prosecuting her cruise for the three months, the insured may recover as for a total loss. *Pond* v. *King* (1747) 1 Wils. 191.

An abandonment is not defeated by the mere restitution and return of the ship, if under such conditions as to make it uncertain whether the assured may not have to pay more than it is worth. *M'Iver* v. *Henderson* (1816) 4 Maule & S. 576, 16 Revised Rep. 550.

If a captured vessel be recaptured by a friend before abandonment to the insurer, the right of abandonment may or may not be defeated according to the circumstances of the case. If the recapture be made merely with a view to salvage, and this together with the expenses does not exceed one half the value of the vessel, and the recapture is productive of a temporary interruption of the voyage, the insured is not at liberty to throw the whole loss upon the underwriters by abandoning it to them. But if the recapture be with the view to make prize of the vessel, or if in consequence of the recapture the voyage be lost or not worth pursuing, if the salvage be very high or if further expense be necessary, and the insurer will not agree to pay it, the insured is at liberty to abandon. *Queen* v. *Union Ins. Co.* (1808) 2 Wash. C. C. 331, Fed. Cas. No. 11,505.

A capture and recapture subjecting the property recovered to a salvage of half its value, to be paid upon the restoration of the vessel, at a port out of the course of the voyage insured, where the cargo procured for the voyage was necessarily discharged and sold, whereby

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the voyage itself was entirely defeated, are circumstances constituting a technical total loss at the election of the insured. *Oliver* v. *Newburyport M. Ins. Co.* (1807) 3 Mass. 37, 3 Am. Dec. 77.

If a ship and cargo insured for a voyage are taken and recaptured, and on the recapture the captain, acting fairly for the benefit of his employer, sells the ship and cargo, and thereby puts an end to the voyage, the insured may recover as for a total loss. *Milles* v. *Fletcher* (1779) 1 Dougl. K. B. 231.

Where a vessel is captured and afterward retaken and condemned and sold in the court of admiralty in order to pay the recaptors their salvage, the insured may, upon offering to relinquish the residue of the proceeds, recover as for a total loss. *Pringle* v. *Hartley* (1744) 3 Atk. 195.

But if a vessel captured during the voyage, and afterwards recaptured, performs or may perform it, there can be no abandonment after the recapture, for a technical total loss. *Smith* v. *Universal Ins. Co.* (1821) 6 Wheat. 176, 5 L. ed. 235 (*dictum*). And so, where a ship is captured, but is subsequently recaptured and restored to the possession of the assured without damage, and completes her voyage and earns her freight, the assured is not entitled to abandon, the loss being only partial. *Bainbridge* v. *Neilson* (1808) 10 East, 329, 1 Campb. 237, 10 Revised Rep. 316, 1 Eng. Rul. Cas. 121; *Patterson* v. *Ritchie* (1815) 4 Maule & S. 393, 16 Revised Rep. 498; *Brotherston* v. *Barber* (1816) 5 Maule & S. 418, 17 Revised Rep. 378. It is immaterial that the abandonment was made at a period when the loss was an actual subsisting total loss, and not merely so in the bona fide contemplation of the parties. *Brotherston* v. *Barber* (1816) 5 Maule & S. 418, 17 Revised Rep. 378.

Where at the time of abandonment the ship had sustained no other loss by reason of the capture than a short temporary obstruction and a charge for salvage, which the insurer offers to pay and satisfy, the insured can recover only as for a general average loss. *Hamilton* v. *Mendes* (1761) 2 Burr. 1198, 1 W. Bl. 276, 1 Eng. Rul. Cas. 112.

Where a vessel was captured and afterward recaptured, and her cargo sold by the captain at a port to which she has been carried in order to pay salvage, the insurer is liable only for an average loss where it does not appear that the captain exhausted other resources to raise the money or to complete the voyage. *Underwood* v. *Robertson* (1815) 4 Campb. 138, 16 Revised Rep. 760.

Recapture does not defeat an abandonment of a cargo insured to the insurers, where the captors, instead of forwarding the ship to her port of destination, sent her to another port, where part of her cargo was found damaged and ordered thrown overboard and the rest of the cargo and the ship were put up for sale. *Cologan* v. *London Assur. Co.* (1816) 5 Maule & S. 447, 17 Revised Rep. 390.

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The owner of a vessel cannot abandon and recover as for a total loss where the vessel is afterwards restored, though the voyage itself be lost. *Parsons* v. *Scott* (1810) 2 Taunt. 363, 11 Revised Rep. 610.

A temporary capture with a subsequent recovery and final arrival at the port of destination is not a total loss in the case of a wager policy. *Clendining* v. *Church* (1805) 3 Caines, 141. In *Assiviedo* v. *Cambridge* (1712) 10 Mod. 77, it was intimated that no recovery might be had on a wager policy where a ship, having been captured, was recaptured before the property therein was changed; and the case was set down to be reargued, but it does not appear from any report that the second argument was ever heard.

e. Effect of bidding in property for owner's benefit.

In *McMasters* v. *Shoolbred* (1794) 1 Esp. 237, 5 Revised Rep. 735, it was held that where the ship insured has been captured, and brought into a neutral port, and sold by the captors, and purchased by the captain for the benefit of the owners, they are entitled to recover only the sum paid by the captain and what may be expended in her outfit, and cannot recover for a total loss.

So, also, in *Maryland & P. Ins. Co.* v. *Bathurst* (1833) 5 Gill & J. 159, it was held that if after capture and abandonment, but before condemnation, a ship be ransomed by the captain, or retaken by the crew, or be recovered and delivered to the owners, who claim and use her as their own, they possess her under no new title or right of property; their acts are their assertion of their original ownership and therefore inconsistent with the abandonment, which, if sustained, casts the right of property on the insurers. In discussing this point the court said: "We are aware that this question has been apparently otherwise decided in some of the United States, and especially in New York, where, in the honest zeal for the protection of insurers, it is respectfully suggested, they have stretched their doctrine upon this subject to an unjust invasion of the rights of the insured, and gone beyond what the policy, or analogies of the law, would sanction. The principle contended for in the argument, as fairly deducible from the New York cases, is that the acceptance by the insured for his own benefit, of a purchase of the thing insured, made by the captain for account of his owner, is *per se* a waiver of the abandonment; and converts the otherwise total into a partial loss. To this universal and unqualified proposition, we cannot assent. Whilst we admit that the law has wisely erected around insurers an impenetrable barrier to fraud and injustice on the part of the insured, we insist that in doing so it has gone no further than the necessity of the occasion demanded, and that it has not been unmindful of providing a like protection for the insured against practices of a similar character

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emanating from the insurers. That whilst *uberrima fides* is exacted of the insured, a like course of conduct must be practised by insurers. That to neither party is it permitted to do acts the natural tendency of which is injustice and imposition on the other. We freely concede that neither the insured in person, or through the instrumentality of others, either before or after the condemnation of the thing insured, possesses, where an abandonment has been made, an unqualified right to become its purchaser, for their own benefit. Such purchases, after condemnation, where a total loss is claimed, are ever subject to this qualification; that the insurers have the right or privilege, if they see fit, to exercise it within a reasonable time after a knowledge of the purchase, to elect to become themselves the purchasers; and if the insured refuse to surrender the bargain, the total is converted into a partial loss; or, in other words, the insurers, by their election, having made the thing insured their own, have a right to deduct from the plaintiffs' claim the amount of the insurance, first subtracting therefrom the quantum of loss actually sustained by the insured, by reason of the perils insured against. By an abandonment, the rights of the underwriters relate back to the date of the disaster, not of the abandonment. All intermediate acts of the captain, and agents of the insured, inure to the benefit of the insurer. Any purchase, therefore, made by such captain or agents, no matter for whose account, if in due season adopted by the underwriters, becomes their own."

Where a vessel taken by the enemy is afterward retaken and carried into a port where, by agreement between the captor and recaptors, without going into the court of admiralty, she was sold at public sale for about one fourth of the sum insured, and bought by the captain of the former owners, who afterwards acquiesced in the purchase, it was held that there was no abandonment and therefore no total loss, but an average loss. *Story* v. *Strettell* (1764) 1 Dall. 10, 1 L. ed. 15.

In *Oliver* v. *Newburyport M. Ins. Co.* (1807) 3 Mass. 37, 3 Am. Dec. 77, where a vessel was captured and afterward recaptured and sold under a decree of the admiralty at the instigation of the master, who was also a part owner, upon an alleged want of funds to pay the salvage, and the master became the purchaser of the ship at the sale and brought her back home, it was held that the insured might not, by abandoning to the insurer the proceeds of the sale, become entitled to recover as for a total loss while at the same time retaining the vessel.

On the other hand, it has been held that the right to recover as for a total loss becomes consummate by an offer to abandon after capture, and is not altered by the circumstance that the vessel is afterward bought in upon a sale under a decree of condemnation by

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a friend or agent of the assured. *Bourke* v. *Granberry* (1820) Gilmer (Va.) 16, 9 Am. Dec. 589.

f. Stipulations restricting right to abandon.

The right of abandonment is not enlarged, but is restricted, by a provision that in case of capture or restraint the insured is not to abandon until the property is condemned, or until it shall have been proved to have been ninety days under detention. *Dorr* v. *Union Ins. Co.* (1812) 8 Mass. 502.

Under a clause in a policy of insurance that in case of detention the insured shall not have a right to abandon therefor until proof is exhibited of the continuance of the detention for at least ninety days, he cannot abandon until he has received intelligence and proof that the detention has continued for such time. *Lovering* v. *Mercantile M. Ins. Co.* (1832) 12 Pick. 348.

A clause in a policy providing that in case of capture or detention the assured shall not abandon short of six months after notice thereof shall be given to the underwriters, unless sooner condemned, is not to be regarded as a mere suspension of a particular remedy, but the property detained continues to every purpose the property of the assured, protected, indeed, by the policy against the other perils undertaken by the insurers; but not in any sense lost by a restraint or detention unless that shall be continued for the period stipulated, and further until the time when the offer to abandon is made. *Delano* v. *Bedford M. Ins. Co.* (1813) 10 Mass. 347, 6 Am. Dec. 132.

Where a cargo policy contains a warranty "not to abandon if turned away nor if captured until condemned," the insured cannot abandon as for a loss of the voyage because, having been captured and sent into a British port on suspicion of having enemy's property on board, and having been subsequently released, he is refused admission to the port of destination because he had come direct from an English port. *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. 88.

That a warranty "not to abandon in case of capture until condemned" must be taken to mean the capture *jure belli* and a judicial condemnation in a prize court of competent jurisdiction, see *Barney* v. *Maryland Ins. Co.* (1820) 5 Harr. & J. 139, set out under VII. a, supra.

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[ENGLISH COURT OF APPEAL.]

YANGTSZE INSURANCE ASSOCIATION *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

[1908] 2 K. B. 504.
Also Reported in 77 L. J. K. B. N. S. 995, 99 L. T. N. S. 498, 24 Times L. R. 687, 52 Sol. Jo. 550, 13 Com. Cas. 283.

Insurance (marine) — Warranty against contraband of war — Persons not contraband — Breach of warranty.

Semble, the term "contraband of war," in its natural sense, and in the absence of special circumstances, or of something in the context pointing to another meaning, is applicable to goods only, and not to persons; and therefore the transport of military officers of a belligerent state as passengers on board a neutral ship is not a breach of a warranty against "contraband of war" in a policy of marine insurance.

Judgment of Bigham, J. [1908] 1 K. B. 910, 77 L. J. K. B. N. S. 392, 24 Times L. R. 381, 52 Sol. Jo. 315, affirmed.

(May 29, 1908.)

APPEAL from the judgment of Bigham, J., reported [1908] 1 K. B. 910, 77 L. J. K. B. N. S. 392, 24 Times L. R. 381, 52 Sol. Jo. 315.

The action was by assured against underwriters on a policy of reinsurance.

The facts, which are fully stated in the report of the case in the court below, may, for the purposes of this report, be sufficiently gathered from the judgment of the President.

J. A. Hamilton, K.C., and **Maurice Hill**, for the defendants. Their arguments and the authorities cited by them were, in substance, the same as in the court below.

Scrutton, K.C., and **Leck**, for the plaintiffs, were not called upon to argue.

[505] **Sir Gorell Barnes**, President: The facts of this case are fully stated in the judgment of the learned judge in the court below, and it is not necessary that I should recapitulate them at length for the purposes of my judgment. The question

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which arises upon those facts is whether the defendants, who underwrote a policy of reinsurance effected by the plaintiffs, are freed from liability upon that policy by reason of the breach of a warranty therein contained. The plaintiffs had underwritten a policy for 18,000*l.* on the steamer Nigretia at and from Shanghai to Vladivostok, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. That policy contained a warranty "not to carry cargo other than kerosene oil," and covered "the risk of capture." The policy underwritten by the defendants was described as "being a reinsurance of the Yangtsze Insurance Association Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk." The policy of reinsurance contained the following provision: "Warranted no contraband of war on basis of cable dated 31 October, 1904, copy of which attached hereto." The copy of telegram attached was of a telegram sent from the office of the plaintiffs at Shanghai to the plaintiffs' London office, which ran as follows: "S.S. Nigretia.—Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British consul that kerosene not regarded contraband by Japanese government if shipped anywhere. Cannot give further guaranty." At the time a state of war existed between Russia and Japan. The steamer sailed on the insured voyage to Vladivostok, and was, while on that voyage, captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, where she was condemned by a Japanese prize court. The judgment of that court found that two Russian naval officers, who had assumed German names, were received on board the Nigretia at Shanghai as passengers to Vladivostok. There was no proof that the captain or owners of the vessel knew that those two persons were Russian officers, but, on the other hand, the Japanese court found that there was [**506**] no proof that they were ignorant of the fact, and the court held that the ship must be confiscated as having been engaged in transporting these persons. The plaintiffs paid on the original policy as for a total loss, and then brought the action on the reinsurance policy, claiming to be

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indemnified by the defendants. On the trial Bigham, J., gave judgment for the plaintiffs.

To my mind, this case does not really raise the broader question as to the meaning in general of the term "contraband of war." In my view the particular warranty relied upon was inserted in the policy with the knowledge on the part of both parties and on the basis that they were dealing with a cargo of kerosene oil, there being a warranty in the original policy "not to carry cargo other than kerosene oil;" and the copy telegram was attached for the purpose of making it clear what the warranty with regard to that cargo was intended to be, the effect of it being that the defendants undertook the reinsurance with a warranty as to the cargo which only protected them to the extent indicated by the telegram. That warranty, in my opinion, related only to the cargo, and therefore there was no breach of the warranty in the sense in which I read it.

This view, if correct, would reduce any observations on the broader question as to the meaning in general of "contraband of war" to the position of *obiter dicta;* but, as that question has been discussed before us, I think it desirable that I should state my opinion with regard to it. The defendants' counsel has cited as being in his favor certain passages from text-books, in which the authors were dealing with the general topic of the effect of breaches of neutrality by reason of a ship carrying persons or things which she ought not to carry, and the carriage of which exposes her to the risk of capture and condemnation. But it is remarkable that no case has been cited in which, in the courts of this country, persons have ever been spoken of as being "contraband of war." Going back to old days, one of the leading cases on the subject is *The Jonge Margaretha* (1799) 1 C. Rob. 189, which was a decision of Lord Stowell, and is included in Tudor's Leading Cases on Mercantile Law, 3d ed. 981. The learned editor of that work, in discussing the question what is "contraband [507] of war" in his note to that case, begins by saying that "one of the most important exceptions to the rule allowing neutrals to carry on commercial intercourse with the belligerents on both sides is that which forbids them to supply any of them with what is called contraband of war; under which

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term are comprehended all such articles as may serve a belligerent in the direct prosecution of his hostile purposes." I think it will be found, on looking at the numerous cases in which Lord Stowell and other learned judges have dealt with the question what is and what is not "contraband of war," they all relate to things, and not to persons. In my opinion, when one is dealing, as in this case, with a commercial contract made between commercial men with regard to insurance, prima facie the correct view to take is that the expression "contraband of war" is used in the primary sense in which it is generally used; namely, as applicable to goods. That this is the natural meaning of the term appears to be borne out by the definition of "contraband" given in the dictionaries. For instance, in the Oxford English Dictionary, edited by Murray, vol. 2, p. 912, I find the following meanings given under the word "contraband:" "1. Illegal or prohibited traffic; smuggling." "2. Anything prohibited to be imported or exported; goods imported or exported contrary to law or proclamation; smuggled goods." "3. (In full contraband of war.) Anything (esp. arms, stores, or other things available for hostile purposes) forbidden to be supplied by neutrals to belligerents in time of war, and liable by the law of nations to be captured and confiscated." There are other meanings there given, the effect of the whole being, as it seems to me, to show that the term "contraband" in its primary and proper sense applies only to goods. Having regard to the considerations which I have mentioned, namely, that no case has been cited in which in an English court the term "contraband" has been used with regard to a person, and that the term is defined in well-known dictionaries as only relating to goods, and also to the fact that in the works of some text writers, particularly Hall on International Law, pp. 640, 673, the term "contraband of war" is used as relating only to goods, and the expression "analogues of contraband" is employed by the author when dealing with the carriage of persons, I have [508] no hesitation in saying that, in my opinion, if the decision of this case depended on the broader question which was dealt with by Bigham, J., it ought to be decided in accordance with his view of the matter. It is not without interest to notice that, in the declarations with regard to contraband which were

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made at the commencement of the Russo-Japanese War by the Japanese and Russian governments respectively, and which are to be found set out in the work of Messrs. F. E. Smith and N. W. Sibley on "International Law as interpreted during the Russo-Japanese War," the lists of matters declared to be contraband appear to be confined to things, and not to include persons. Again, in the Declaration appended to the Treaty of Paris, which was signed in 1856 by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, respecting maritime law in time of war,[1] the term "contraband" is used in such a way as to indicate that only articles or goods were referred to, and not persons. I may perhaps be going beyond what is necessary for the decision of this particular case in making these observations on the broader question, but, in my opinion, on the terms of this particular policy and also on the broader ground to which I have alluded, there was no breach of the warranty given, and the appeal must therefore be dismissed.

Fletcher Moulton, L.J.: I am of the same opinion, and have only a very few words to add on the second point. The phrase "contraband of war" is, in my view, naturally applicable to goods, and not to despatches or persons; but I should be prepared to consider the question whether it might not be used in a wider sense, if there were anything to show that such a use of it was common among commercial men, or in commercial documents, or was recognized in the courts of law. It has, however, been admitted that, though the subject of contraband of war has been discussed in many cases by eminent judges, there is no instance in any reported case in which the term has been applied otherwise than to goods. It appears to have been applied to persons by [509] one or two text-book writers only, in passages where it is apparent from the context that it was not being used in a strict sense.

Farwell, L.J.: I agree. In my opinion the term "contraband of war" is, in its primary meaning, applicable only to

[1] See Hertslet's Commercial Treaties, vol. x. p. 547; Wheaton's International Law, 4th ed. p. 803; E. A. Whittuck, International Documents, London, 1908, p. 1.

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goods; and I do not think that the defendants' counsel meant to dispute that this was so. His contention was that the term had acquired a secondary meaning. The general rule of construction is that words used in documents must receive their primary signification, unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, show that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning *quoad hoc*. *Simpson* v. *Margitson* (1847) 11 Q. B. 23, at p. 31, 17 L. J. Q. B. N. S. 81, 12 Jur. 155. There is no question here of anything in the nature of a trade usage, or of surrounding contemporaneous circumstances; and I can see nothing whatever in the context to qualify the primary meaning of the term "contraband of war." This was a trading vessel which was intended to carry cargo, and the parties were not contracting with any idea that persons would be carried. On both the grounds referred to by the learned President, I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for defendants: *Thomas Cooper & Company.*

Note.—Effect of carriage of contraband upon marine insurance.

Inasmuch as the case above reported seems to be the only instance in which the question whether persons may be considered "contraband of war," within the meaning of a warranty against contraband of war in a marine insurance policy, has been decided, this note has been given the broader scope indicated by its title. Before entering upon a review of the cases on this subject, however, it may be of interest to note that in international law persons in the military service of a belligerent are considered as analogues of contraband, rendering the neutral vessel engaged in their transportation liable to seizure and condemnation in the prize courts of the opposing belligerent.

Accordingly, as suggested in 17 Laws of England (Halsbury) 422, the carriage of military or naval persons in the service of a belligerent, in circumstances which render the ship liable to condemnation,

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is a breach of the warranty of neutrality in policies of marine insurance.

A neutral ship which has been employed in transporting enemy's troops is, at least where such service has not completely terminated, liable to seizure, even if the employment was by duress. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress against the government that has imposed the restraint upon him. *The Carolina* (1802) 4 C. Rob. 256. And see also *dictum* in *Gallego* v. *United States* (1908) 43 Ct. Cl. 444, at p. 449.

And a neutral ship chartered to carry out officers in the military service of the enemy is subject to seizure and condemnation, and the number so carried is immaterial. *The Orozembo* (1807) 6 C. Rob. 430.

And the same consequence follows where passage has been engaged on a neutral vessel by agents of a belligerent government for the crews of wrecked vessels in the naval service of that government. *The Friendship* (1807) 6 C. Rob. 420.

In the above case Sir W. Scott said, however, that it would be a very different case if a vessel appeared to be carrying only a few individual invalided soldiers or discharged sailors, taken on board by chance and at their own charge.

In Moore's International Law Digest, Vol. 7, p. 755, it is said, with reference to the carriage of persons in the service of a belligerent: "It is admitted that a neutral vessel engaged in the carriage of persons in the service of a belligerent becomes liable to condemnation either when the belligerent 'has so hired it that it has become a transport in his service that he has entire control over it; or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war.' Hall, Int. Law, 4th ed. 701. This rule leaves open the question as to the carriage of persons in the service of belligerent by a neutral vessel in the ordinary course of trade. The view has been expressed that if such persons may be classed as contraband the vessel may be seized and brought in for adjudication; but that if they may not be so classed the vessel in which they are traveling remains a ship under neutral jurisdiction which has not been brought by the conduct of the persons having control over it within the scope of those exceptional rights in restraint of trade which belligerents have been allowed to assume. Hall, Int. Law, 4th ed. 705. On the other hand, the view has been expressed that 'it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are differ-

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ent.' Mountague Bernard, quoted by Hall, Int. Law, 4th ed. 708. Apparently the great majority of writers treat the transportation of persons in the military service of the enemy either as a carriage of contraband or as an act analogous thereto. It is probable, however, that too much importance has been given to this somewhat technical aspect of the matter, since it seems to be generally agreed that the carriage of such persons to a military destination is an enemy service far more important than the carriage of contraband. From the belligerent's point of view the importance of the act consists not in the manner or in the motive with which it may be done, but in the aid rendered to the enemy. Whether the circumstances of the transportation may or may not be such as to render the vessel liable to confiscation, it is reasonable to hold that it is a right of the belligerent to take proper measures to prevent the enemy from receiving military aid under the protection of a neutral flag. As to the number of military persons necessary to subject the vessel to confiscation no rule can be laid down. 'To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment.' Laurence's Wheaton, Int. Law, 1863 ed. 802. Although the case of the Trent related to persons in the diplomatic, and not in the military, service of the enemy, a considerable majority of the authorities seem to concur in the opinion that the discussion which then took place resulted in a general understanding that in the absence of a treaty it is no longer allowable to take persons out of a neutral ship, but that the ship herself, with the noxious persons on board, must be brought in for judicial examination."

As affecting validity of insurance.

As neutrals are entitled to carry on their trade with a belligerent, subject to the opposing belligerent's right of capture, it follows that the carriage of contraband goods and voyages in breach of blockade are not illegal, and that insurances on such goods or voyages are valid. 17 Laws of England (Halsbury) 430; *Maryland Ins. Co.* v. *Bathurst* (1833) 5 Gill & J. 159; *Richardson* v. *Maine F. & M. Ins. Co.* (1809) 6 Mass. 102, 4 Am. Dec. 92; *Cook* v. *Essex F. & M. Ins. Co.* (1809) 6 Mass. 122.

In *Richardson* v. *Maine F. & M. Ins. Co.* (1809) 6 Mass. 102, 4 Am. Dec. 92, it is said that an insurance effected in the country of a neutral prince by his subjects against capture and condemnation of their goods because they are contraband of war is not prohibited by his laws merely because the capture and condemnation are justified by the laws of war; but that if goods contraband of war are on cargo, the insurer is not responsible for their capture and condemnation on that account unless either with a full knowledge of the nature of the goods and of the voyage, or by an express undertaking he shall insure

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them against such capture, though he will be answerable for the other risks against which he has insured.

In *The Santissima Trinidad* (1822) 7 Wheat. 283, 5 L. ed. 454, it is said that the sending of armed vessels or of munitions of war from a neutral country to a belligerent port for sale as articles of commerce is unlawful only as it subjects the property to confiscation upon capture by the other belligerent.

In *Caine* v. *Palace Steam Shipping Co.* [1907] 1 K. B. 670, 76 L. J. K. B. N. S. 292, 96 L. T. N. S. 410, 23 Times L. R. 203, 12 Com. Cas. 96, 10 Asp. Mar. L. Cas. 380, 7 Ann. Cas. 343, it was observed by Farwell, L. J., that it is well settled that the carrying of contraband in time of war between two belligerents is legitimate trading, although the trader runs the risk of capture and of the condemnation of the contraband stores, and in many, if not in all, cases of his ship also.

A charter party to sail to a port known to the parties at the time to be blockaded is not void on the ground of illegality. *Medeiros* v. *Hill* (1832) 8 Bing. 231, 1 Moore & S. 311, 5 Car. & P. 182, 1 L. J. C. P. N. S. 77.

So, also, it has been held that a contract between the subjects of neutral states for a joint adventure for the supply of contraband of war to a belligerent power is not an illegal contract, although by the law of nations the other belligerent power may seize such contraband *in transitu*. *Re Grazebrook* (1865) 34 L. J. Bankr. N. S. 17, 4 De G. J. & S. 655, 11 Jur. N. S. 400, 12 L. T. N. S. 249, 13 Week. Rep. 627.

See also *The Helen* (1865) L. R. 1 A. & E. 1, 35 L. J. Prob. N. S. 2, 11 Jur. N. S. 1025, 13 L. T. N. S. 305, 14 Week. Rep. 136, where it was held not to be a municipal offense to carry on trade with a blockaded port, so as to preclude the maintenance of an action for wages earned in such enterprise.

Insurance on other goods is not invalidated by the carriage of contraband, since contraband goods found on board a ship are alone liable to confiscation, while innocent goods are not affected unless they belong to the same owner. *Levy* v. *Merrill* (1826) 4 Me. 180.

Where there is no warranty in an open policy of insurance on a cargo against the carriage of contraband, the insurer of the cargo is liable although the captain may have been guilty of barratry in taking the contraband on board without the plaintiff's knowledge. *Baltimore Ins. Co.* v. *Taylor* (1805) 3 Harr. & J. 198.

— may be invalid where trade in contraband is prohibited by local law.

In *Richardson* v. *Maine F. & M. Ins. Co.* (1809) 6 Mass. 102, 4 Am. Dec. 92, it was observed that if the exportation of contraband

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goods from a neutral country to a port of either of the powers at war is a trade which from its nature is prohibited by the laws of the neutral sovereign, then the policy on such goods would be void, and the insurer would be exempted from any loss or damage arising, even from the danger of the sea.

Contraband as "lawful goods" within meaning of policy.

Articles contraband of war are covered by a policy of insurance "upon all kinds of lawful goods." *Seton* v. *Low* (1799) 1 Johns. Cas. 1. In discussing this point, Kent, J., said: "It may be said that the law of nations is part of the municipal law of the land, and that by that law (and which, so far as it concerns the present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet at the same time, from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defense. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral, in articles contraband of war, is therefore a lawful trade, though a trade, from necessity, subject to inconvenience and loss."

A warranty in a policy of insurance on the commissions of the master of a vessel on "lawful goods" consigned to him is not broken by the shipment of contraband without the knowledge of the insurer. *De Peyster* v. *Gardner* (1803) 1 Caines, 492.

Duty of disclosure.

Where the insured has requested insurance "against all risks," he is not bound to disclose the fact that the vessel is engaged in carrying contraband, where it is generally known that such traffic is being carried on. *Maryland Ins. Co.* v. *Bathurst* (1833) 5 Gill & J. 159.

So, also, in *Seton* v. *Low, supra,* it is held that the assured is not bound to disclose to the insurer that the goods insured are contraband of war. Upon this point it was said by Kent, J.: "The law does not infer, and the insurer has no right to infer, a diminution or abridg-

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ment of the neutral trade, in consequence of a foreign war, because the neutral is under no moral or legal obligation to abridge it. The presumption will be that the neutral trades, as usual, without any regard to the accidental circumstances of a war abroad, and without rejecting any part of his customary cargo, though a certain species of it, under the description of articles contraband of war, is exposed to seizure, by coming in collision with certain rights of necessity created by the war. Underwriters are to presume the trade to be in its unfettered state, and to take the risk of the interfering rights I have mentioned. As in the former case of a war, in which the United States are a party, the assured can always diminish the premium consequent on the extraordinary risk, by a warranty that the property is neutral; so, in the latter case, of a war abroad, increasing by necessary consequence, the risk in a smaller degree, the assured can always diminish the premium attached to such increased risk, and reduce it to the standard of a peace premium, by a warranty that the cargo is not contraband of war. It is a general and a just principle, that every fact, in the knowledge of the assured, which enhances the ordinary risk, and which would, if disclosed, enhance the premium, ought to be communicated to the underwriters. But the principle is limited to circumstances which the underwriter is not presumed to know, nor bound to know; and, if my reasoning be good, the underwriter is presumed to know that the neutral trade undergoes no abridgment, or abandonment, in war; that it is likely to consist of the same kind of articles in war as in peace, and, consequently, that the nature of the cargo need not be disclosed."

And see to the same effect, *Skidmore* v. *Desdoity* (1800) 2 Johns. Cas. 77, where the insurance was upon "the lawful goods and merchandises" against all risks.

In *Northwestern S. S. Co.* v. *Maritime Ins. Co.* (1908) 161 Fed. 166, where a vessel insured against war risks on a voyage from Seattle to Vladivostok during the war between Russia and Japan, with a cargo consisting principally of salt beef, cleared for Shanghai, a neutral port, and carried documents showing that as her destination, but her bill of lading and other papers showed her to be an American merchant vessel, the true nature of her cargo, and her true destination, and the vessel was captured by the Japanese, her cargo condemned as contraband of war and herself as prize, but not for lack of documents showing the true nature of her cargo and destination, the court found as a fact that the nature of the cargo and the falsity of the ship's documents with respect to her port of destination were not matters which would have influenced a reasonable underwriter, and did not enhance the risk, and therefore held that the insurance was not invalidated for failure to disclose the above facts, where the cargo was known to the insurer to be of the character which would

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probably be treated as contraband in case of capture, and the policy contained express permission for the ship to run a blockade, and the measures taken to conceal her distination did not increase but tended to lessen the risk.

Effect of warranty against contraband or illicit trade.

Since, as above pointed out, insurance on a cargo is not invalidated by the fact that it consists of or comprises contraband goods, it is necessary, in order to protect the insurer, to insert a stipulation to that effect.

Many of the so-called "warranties" in policies of marine insurance really operate only as exceptions from the risks assumed. But in *Thompson* v. *Mississippi M. & F. Ins. Co.* (1831) 2 La. 228, 22 Am. Dec. 129, it is held that a warranty "free from any damage or loss which may arise in consequence of having been engaged in illicit or prohibited trade" operates as a condition precedent to the right of recovery, so that it is immaterial that the illicit trade had no agency in producing the loss, provided the condition is not complied with.

Where the consequence of carrying contraband goods is only to subject the goods, and not the vessel, to condemnation, the carriage of such goods is not a breach of a warranty in a policy of insurance on the vessel "free from any damage or loss which may arise in consequence of having been engaged in illicit or prohibited trade." *Ibid.*

If both insurer and insured on lawful goods in a policy containing a clause of warranty against loss "by capture or detention for or on account of any illicit trade or trade in articles contraband of war" know there is contraband on board, the warranty will apply only to the goods insured. *Bowne* v. *Shaw* (1803) 1 Caines, 489.

Insurers assume the contraband risk when contraband articles are set forth and expressly named in the policy, notwithstanding a printed clause in the policy excepts articles contraband of war. *Howland* v. *Commercial Ins. Co.* (1808) Anthon, N. P. 26.

In order to exonerate the insurer under a clause stipulating that it shall not be liable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit trade or trade in articles contraband of war, the seizure or detention must be for a legal or justifiable cause. *Carrington* v. *Merchants' Ins. Co.* (1834) 8 Pet. 495, 8 L. ed. 1021.

But in *Seymour* v. *London & P. Marine Ins. Co.* (1872) 1 Asp. Mar. L. Cas. 423, 41 L. J. C. P. N. S. 193, 27 L. T. N. S. 417, it was said that it may well be argued that as between the underwriters and the assured the warranty "no contraband of war," being expressed generally, must include goods which, there being a war between any two countries, would from their nature be specially liable to be seized by either of them, even though such goods, not being

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intended for one of the countries at war, might not be legally seizable.

A warranty against contraband of war is violated by shipment of goods of a contraband character to a neutral port with the real intention of there transshipping the goods to a belligerent port. *Ibid.*

But a plea in an action on a policy of marine insurance, that the goods insured were contraband of war and were shipped for the purpose of being sent to and imported into a belligerent country, but which does not deny that the goods were sent from a neutral port to a neutral port in a neutral ship, does not set up a sufficient defense, although, by reason of the proximity of the neutral port to the belligerent country, the opposing belligerent has seized the goods as contraband of war. *Hobbs* v. *Henning* (1865) 17 C. B. N. S. 791, 11 Jur. N. S. 223, 34 L. J. C. P. N. S. 117, 12 L. T. N. S. 205, 13 Week. Rep. 431.

Where the policy of insurance provides that "the insurers shall not be answerable for any loss which may arise in consequence of seizure for or on account of illicit or prohibited trade or trade in articles contraband of war," it is sufficient to exonerate the insurer that the vessel was seized for attempting to trade in violation of the law of nations by participating in a filibustering expedition. *Decrow* v. *Waldo Mut. Ins. Co.* (1857) 43 Me. 460.

Conclusiveness of decision of prize court as to contraband character.

In England the courts "after much hesitation . . . have held that the sentence of a competent prize court (either of an enemy's or of a neutral country) is, in actions on a marine policy, conclusive as to the existence of the ground on which the court professes to decide." 17 Laws of England (Halsbury) p. 422, citing *Lothian* v. *Henderson* (1803) 3 Bos. & P. 499, 7 Revised Rep. 829; *Bolton* v. *Gladstone* (1805) 5 East, 155, 7 Revised Rep. 674; and see also *Gibson* v. *Mair* (1813) 1 Marsh. 39, 15 Revised Rep. 668, in which it is held that sentence of condemnation is sufficient evidence that the ship has been engaged in some illegal transaction.

But in *Laing* v. *United Ins. Co.* (1802) 2 Johns. Cas. 487 (reversing 2 Johns. Cas. 174), it is held that in an action upon a policy of insurance whereby the assured warrants the property "free from any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war," the decision of a foreign prize court is not conclusive evidence that the cargo contained contraband of war.

The finding of a matter of fact in the course of the adjudication

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of a prize court cannot be pleaded as an estoppel in cases where if adduced in evidence the judgment would be received as conclusive evidence of the fact so found. *Hobbs* v. *Henning, supra.*

E. S. O.

[HOUSE OF LORDS.]

ANDERSEN, *Appellant,*
and
MARTEN, *Respondent.*

[1908] A. C. 334.
Also Reported in 77 L. J. K. B. N. S. 950, 99 L. T. N. S. 254, 24 Times L. R. 775, 52 Sol. Jo. 680, 13 Com. Cas. 321.

Insurance (marine) — Warranty of freedom from capture — Capture of neutral ship by belligerents — Subsequent loss by perils of the sea — Total loss — Condemnation — Relation back of title of captor.

In a policy against perils of the sea the risk insured was only against total loss and "warranted free from capture." A neutral ship thus insured during the Russo-Japanese War was captured by the Japanese, and while being navigated towards a Court of Prize was wrecked and became a total loss. She was afterwards condemned in the Prize Court:—

Held, that there was in fact a total loss by capture, and that the owner could not recover on the policy.

Decision of the Court of Appeal [1908] 1 K. B. 601, 77 L. J. K. B. N. S. 569, 98 L. T. N. S. 146, 24 Times L. R. 208, 13 Com. Cas. 205, 10 Asp. Mar. L. Cas. 605, affirmed on the above ground.

(July 3, 1908.)

THE facts arising on this appeal are stated in the judgment of Lord Loreburn, L.C.

J. A. Hamilton, K.C., and E. M. Pollock, K. C. (Balloch with them), for the appellant. The proximate cause of the loss of the ship was perils of the sea, and not the capture. The loss by capture was partial loss only, and there was no relation back to the date of the seizure. There was no property in the vessel, no right *in re,* until condemnation, although the captors had rights *in rem.* The Romulus was a neutral ship,

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and the cases relied upon by the respondents were cases of enemy vessels. *The Tobago* (1804) 5 C. Rob. 218. In *The Maria* (1799) 1 C. Rob. 340, 374, Sir W. Scott lays down the right of the captor as being "to visit and examine," and that the vessel should "submit to the inquiry proposed," "looking with confidence" to the decision of the appropriate tribunal to adjust all the rights and claims involved. *The Dispatch* (1801) 3 C. Rob. 278, was a case of the rescue of a neutral by her crew, which resulted in condemnation. *Der Mohr* (1800) 3 C. Rob. 129, decided [**335**] that in the case of misconduct of a prize master there should be *restitutio in integrum;* and in *Der Mohr* (1802) 4 C. Rob. 314, where the ship was lost by the prize master's negligence, though a portion of the cargo was saved and sold, there was a decree *in toto* against the captor. These authorities show that the question was open until the adjudication of a Prize Court. Moulton, L.J., confuses seizure and adjudication. Many things might happen between the former and the latter; peace, for example, might be declared in the interval. *Hahn* v. *Corbett* (1824) 2 Bing. 205, 9 J. B. Moore, 390, 3 L. J. C. P. 253, 27 Revised Rep. 590, cited by the Master of the Rolls, was the present case inverted, the wreck in that case happening first and the capture afterwards, and supports the appellant's contention, for it was held that the vessel was lost by perils of the sea and was insured by the policy. Here, too, the cause of loss was the wreck, and not the capture; there was a possibility that there would never be a condemnation at all. The text writers state the law in accordance with these contentions. In Hall's International Law, § 277, it is said: "The property remains in the neutral until judgment of confiscation is pronounced by the competent courts after due legal investigation." Arnould, § 829, says that the arrest and carrying in for adjudication of a neutral ship is not properly called "capture" at all, though certain consequences may flow therefrom. The loss and the right to the policy money were, therefore, not excluded by the warranty, which has no application, and the appellant is entitled to recover. The decision of the German Supreme Court of Appeal, before whom the same question arose, was against the respondents in the present appeal.

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Scrutton, K.C. (**Bailhache**, K.C., with him), for the respondent. Of what consequence is it what the German Court decided? The question turns not upon German law, but upon our law, if on any law. But in truth the question is one of fact. Was there a total loss by capture? Turning to the legal aspect, the doctrine of relation back to the date of seizure by the enemy's ship is stated by Lord Mansfield in *Goss* v. *Withers* (1758) 2 Burr. 683, 2 Ld. Kenyon, 325, 1 Eng. Rul. Cas. 1. In *Hamilton* v. *Mendes* (1761) 2 Burr. 1198, 1211, 1 W. Bl. 276, 1 Eng. Rul. Cas. 112, Lord Mansfield says that the law holds the ship to have been lost by the capture contrary to the real truth. The [**336**] doctrine is explicitly reaffirmed by Lord Blackburn in *Cory* v. *Burr* (1883) 8 App. Cas. 393, 398, 52 L. J. Q. B. N. S. 657, 49 L. T. N. S. 78, 31 Week. Rep. 894, 5 Asp. Mar. L. Cas. 109. He says: "When by one of those 'perils' the subject assured is taken out of the control of the owners there is a total loss by that peril." In *Dean* v. *Hornby* (1854) 3 El. & Bl. 180, 2 C. L. R. 1519, 23 L. J. Q. B. N. S. 129, 18 Jur. 623, 2 Week. Rep. 156, there was a total loss by piratical seizure. It was held by Sir W. Grant, M.R., in *Stevens* v. *Bagwell* (1808) 15 Ves. Jr. 139, 10 Revised Rep. 46, that upon condemnation the property was in the captor from the date of the capture; so also *Morrough* v. *Comyns* (1748) 1 Wils. K. B. 211; *Alexander* v. *Duke of Wellington* (1830) 2 Russ. & M. 35, 9 L. J. Ch. 36. The doctrine was applied inversely in *Ruys* v. *Royal Exchange Assurance Corporation* [1897] 2 Q. B. 135, 66 L. J. Q. B. N. S. 534, 77 L. T. N. S. 23, 8 Asp. Mar. L. Cas. 294. The ship, which was insured against war risks, was captured, and notice of abandonment given, but refused by the underwriters. The war ended and the Prize Court decreed the vessel to be returned to the owners. The owners, however, were held still to be entitled to recover as for a total loss.

Pollock, K.C., in reply. The cases cited for the appellant relate to the property of enemies, and not of neutrals. Here there was no notice of abandonment, as in *Hamilton* v. *Mendes* (1761) 2 Burr. 1198, 1 W. Bl. 276, 1 Eng. Rul. Cas. 112. All prize in this country is the absolute property of the Crown, and there is no property before adjudication. *In re Banda and Kir-*

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wee Booty (1866) L. R. 1 A. & E. 109, 35 L. J. Adm. N. S. 17, 12 Jur. N. S. 819, 14 L. T. N. S. 293.

The House took time for consideration.

Lord Loreburn, L.C.: My Lords, in this case the owner of the steamship Romulus insured that vessel for twelve months from January 12, 1905, in a policy expressed to be on disbursements. At the trial it was agreed, no doubt with propriety, that the rights under this insurance were to be determined as though it had been on hull and machinery. The perils usual in a Lloyd's policy, including perils of the seas, men-of-war, takings at sea, arrests, restraints, and detainments, appear in the policy. But the risk insured was only against total loss, and there is the following clause: "Warranted free from capture, seizure, and detention, and the consequences of hostilities, piracy, and barratry excepted."

[337] The Romulus, a German vessel, sailed during the currency of this policy for Vladivostock, a naval port and base of naval operations in the war between Russia and Japan then raging. She carried coal, which had been proclaimed contraband of war. In order to avoid Japanese cruisers the Romulus took a circuitous course to the north, and was so injured by ice that the master made for Hakodate, a Japanese port, for refuge. On February 26, 1905, she was stopped by a Japanese cruiser in the Tsugaru straits, some 30 or 40 miles from Hakodate. A Japanese officer with seamen and marines boarded her, questioned her master, examined her papers, and announced that the ship was captured for carrying contraband. Judging that she could make the voyage to Yokosuka, he ordered the master to proceed thither, remaining himself in control. The Romulus accordingly shaped her course for Yokosuka, but made much water and altered her course. She then went aground, and, being unable to get her off, the Japanese officer was obliged to run her further aground at 2 A. M. on February 27. Ultimately she became a total loss as she lay. On May 16, 1905, after her destruction, the Japanese Court of Prize condemned both ship and cargo on the ground that the former "was employed transporting contraband of war by fraud;" finding also that her papers had been falsified.

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In these circumstances the plaintiff claimed as for a total loss by perils of the seas. The defense was that the owner lost his ship by capture or seizure, or the consequences of hostilities, for which underwriters were not liable, and that subsequently the captors lost her by perils of the seas.

Mr. Hamilton, for the plaintiff, in the course of an argument which loses nothing of its merit by being unsuccessful, urged upon your Lordships that the owner, being a neutral, did not lose either the property in his ship or its possession by the arrest of February 26; that he still remained at risk on the Romulus, and only suffered present inconvenience with a prospect of expense and a possibility of total loss if ultimately she should be condemned. He had a chance, it was argued, better or worse, of recovering his ship by decree of the Court of Prize, even though the cargo should be condemned as contraband, and so [338] still retained an insurable interest until the vessel became a total loss by the perils of the seas. Enemy vessels stand in some respects on a different footing from neutral vessels in regard to the laws of prize. Carriage of contraband to a belligerent port does not impart an enemy character to a neutral ship. She cannot lawfully be destroyed, nor her crew treated as prisoners of war. Carriage of contraband is not unlawful, as aiding an enemy in an expedition. It is an adventure which the offended belligerent may, if he can, visit with the penalty of capture and condemnation by a Court of Prize. I think it is true that in this case the property in the Romulus did not pass wholly from the owner on February 26. The owner still had a chance of recovering the ship, and still remained so at risk that he might in law have insured her, and being insured already his policy was not necessarily at an end, though I cannot agree that he still retained possession.

All this, however, does not, in my opinion, avail the plaintiff, and indeed some part of it might apply to the vessel of a belligerent, for even an enemy merchantman may in some circumstances be released by a Prize Court. The real question is whether there was a total loss by capture, seizure, or detention, or the consequences of hostilities. I think there was in this case a total loss by capture on February 26, to say nothing of

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the other words; namely, seizure, and so forth. That was the day on which the Romulus was seized lawfully, as appears by the subsequent condemnation. There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released.

Suppose that the Romulus had been insured against total loss by capture on a time policy, had been taken safe to Yokosuka, and there condemned, but that the time policy had expired in the interval between the date of her seizure and the date of her condemnation. In such case, if the plaintiff's contention is sound, the very thing which the policy was designed to cover would have happened during the currency of the insurance, and yet by reason of the lapse of time in bringing her into port and obtaining a decree all recourse against underwriters would have been lost, and probably the owner could not have protected himself by [339] further insurance, or, if he could, only by payment of a ruinous premium. A contention which in such circumstances might make the liability of underwriters depend not upon acts done at sea or their lawfulness, but upon the degree of expedition shown by a Court of Prize in adjudicating upon those acts, must surely be erroneous. If there were an appeal from the Prize Court which might not be decided for a long time, this observation would apply with increased force. I think the reasonable and true way of regarding what actually occurred is that there was in fact a total loss by capture on February 26, though its lawfulness was not authoritatively determined till May 16 following.

Accordingly I agree with the order made by the Court of Appeal. And it would not be necessary to say more were it not that our attention has been directed to a decision of the German Supreme Court of Appeal, which proceeds upon an opposite view. It would not be consistent with the great respect due to that court that I should offer any criticism upon its judgment, even if I felt myself competent, as I do not, to discuss German law. I can only say that, without in the least questioning the authority of that court, I think the law of England is as I have said, and I am of course bound to advise your Lordships in accordance with what I believe to be the law of England.

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Earl of Halsbury: My Lords, by agreement between the parties, I suppose to avoid a multiplicity of actions, the policy, which is actually a time policy for disbursements in respect of the ship Romulus, is to be treated as if for hull.

It is for total loss only, and is warranted free from capture, seizure, and detention, and the consequences of hostilities. These are now quite familiar words, and give rise to no ambiguity; and the law is very clear that in this as in other regions of insurance law the immediate, and not the remote, causes of a loss, are to be alone regarded.

This is an English policy, and the questions arising under it are to be decided according to English jurisprudence. I should have thought that, given the facts which the Lord Chancellor has pointed out and which I will not repeat, it would have been [340] impossible in an English Court to deny that there was a total loss to the owner on February 26.

This very question arose just 150 years ago in *Goss* v. *Withers* (1758) 2 Burr. 683, 2 Ld. Kenyon, 325, 1 Eng. Rul. Cas. 1, and was argued before Lord Mansfield, and he observed that a large field of argument had been entered into, and it would be necessary to consider the laws of nations, our own laws, and acts of Parliament, and also the laws and customs of merchants which make a part of our laws. After taking time to consider, the learned judge, delivering the judgment of the whole court on November 23, 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected the change in property, he says: "But whatever rule ought to be followed in favor of the owner against a recaptor or vendee, it can in no way affect the case of an insurance between the insurer and insured. . . . The ship is lost by the capture though she be never condemned at all nor carried into any port or fleet of the enemy, and the insurer must pay the value. If after condemnation the owner recovers or retakes her, the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract; the insurer runs the risk of the insured and undertakes to indemnify. He must therefore bear the loss actually sustained."

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Now I entirely concur with what was said in *Ionides* v. *Universal Marine Ins. Co.* (1863) 14 C. B. N. S. 259, 32 L. J. C. P. N. S. 170, 10 Jur. N. S. 18, 8 L. T. N. S. 705, 11 Week. Rep. 858, 14 Eng. Rul. Cas. 271, that the words here, "warranted free from capture," etc., are to be construed as if these words were used in a policy against those events. Applying Lord Mansfield's words here, it seems to me that it would be a bold thing to argue against a judgment of the full Court of King's Bench presided over by Lord Mansfield, and 150 years after it has been accepted as the law during that period by every English tribunal. I think it is important to insist upon the exact form of the policy here, since I do not know what was the form of the policy upon which the German adjudication was founded. I neither understand that German judgment nor the reasoning by which it has been arrived at by the court, but it is [**341**] obvious that we have neither the policy on which the court was adjudicating nor the language of the court itself.

I say this because the passage in which the court expresses its disagreement with the English judgment (which is, I suppose, either that of Channell, J., or of the Court of Appeal) is hardly intelligible, and though in the present case, as in the case before Lord Mansfield, it is immaterial to consider when or if at all the property was changed, I cannot let it be supposed that I entertain any doubt that the property was changed, and I do not think it is true that the earlier writers ever had any doubt that where, as in this case, the possession was taken by the hostile force and an adjudication of condemnation as prize by the proper tribunal followed on grounds recognized by the general consent of nations to be lawful cause of capture, the rightfulness of the seizure and consequently the change of property related back to the time of capture.

Here a neutral vessel was carrying, with the knowledge and consent of the owner, contraband of war (recognized as such by both belligerents) and furnished with false papers, and how any question could arise as to the lawfulness of the capture I am myself wholly unable to understand. The ship was a total loss from the moment she passed into the possession of the Japanese forces.

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Lord Ashbourne: My Lords, I have had an opportunity of reading the opinions which have been delivered by my noble and learned friend on the woolsack and my noble and learned friend Lord Halsbury, and I entirely concur with them in the conclusion at which they have arrived.

Order of the Court of Appeal affirmed and appeal dismissed, with costs.

Lords' Journals, July 3, 1908.

Solicitors: *Woodhouse & Davidson; William A. Crump & Son.*

Note.—Liability of insurer of vessel or cargo "warranted free from capture."

Inasmuch as words of exception in a policy are to be construed as they would be if the insured had reinsured his cargo against the perils excepted, so that the construction of the exception is the same as that of a policy insuring against the excepted risks, it is necessary, in order to determine the construction, either of a policy of insurance against capture, or of a warranty against capture, to take into account both classes of cases.

As to the effect of insurance covering war risks, generally, see note to *Nickels & Co.* v. *London & Provincial M. & G. Ins. Co. ante,* 1.

The question on which the class of cases comprised in this note generally turns is whether the capture may be considered as the proximate cause of the loss. ANDERSEN v. MARTEN, however, turned upon the question whether the insured had lost his property in the vessel prior to condemnation. In connection with ANDERSEN v. MARTEN it is of interest to note that it was held in *Barney* v. *Maryland Ins. Co.* (1820) 5 Harr. & J. 139, that a seizure of a neutral vessel does not of itself, without condemnation, devest the vessel owner of his right of property therein.

When a policy contains the "free from capture and seizure" warranty, it is for the underwriters to prove that the loss was due to one of the causes excluded by the warranty if they wish to escape liability. *General Steam Nav. Co.* v. *Commercial Union Assur. Co.* (1915) 31 Times L. R. 630.

Signification of word "capture."

The word "capture," as used in policies of marine insurance, is not limited in its signification to the taking of ships or vessels by belligerents engaged in lawful war, nor to their forcible seizure by the

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acts of government, nor is it so restricted by that clause of the policy by which it is stipulated that "in case of capture or detention the insured shall not have the right to abandon therefor until proof is exhibited of condemnation or of the continuance of the detention for at least ninety days." *Dole* v. *New England Mut. M. Ins. Co.* (1863) 6 Allen, 373.

The term "capture" as used in policies of marine insurance originally meant a taking by the enemy of vessel or cargo as prize in time of open war or by way of reprisal with intent to deprive the owner of it; but usage and the course of decisions by the courts have very much widened this meaning, and it is now made to embrace the taking of a neutral ship and cargo by a belligerent *jure belli;* also the taking forcibly by a friendly power in time of peace, and even by the government itself to which the assured belongs. *Mauran* v. *Alliance Ins. Co.* (1867) 6 Wall. 1, 18 L. ed. 836.

The word "capture" in a warranty "free from capture, seizure, or detention" is not to be limited to the same class of risks as those designated by seizure and detention, as applying to acts of governments only. *Dole* v. *New England Mut. M. Ins. Co. supra.*

In *Cory* v. *Burr* (1883) 8 App. Cas. 393, it was said by Lord Fitz Gerald: "In the construction of this warranty it is observable that 'capture' and 'seizure' do not mean the same thing. 'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture' and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession either by a lawful authority or by overpowering force."

What constitutes a capture within terms of insurance or warranty.

Insurance against capture is not subject to an implied exception of capture by the forces of the government upon the subsequent breaking out of a civil war. *Merchants' Ins. Co.* v. *Edmond* (1866) 17 Gratt. 138.

When a portion of the citizens of the government have rebelled, established another government, resorted to arms to maintain it, and the rebellion is of such magnitude that the military and naval forces of the government have been called out to suppress it, the capture of a vessel by the agents of such rebel government is within a warranty "free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat." *Dole* v. *Merchants' Mut. M. Ins. Co.* (1863) 51 Me. 465; *Dole* v. *New England Mut. M. Ins. Co.* (1863) 6 Allen, 373; *Dole* v. *New England Mut. M. Ins. Co.* (1864) 2 Cliff. 394, Fed. Cas. No. 3,966; *Swinnerton* v. *Columbian Ins. Co.* (1867) 37 N. Y. 174, 93 Am. Dec. 560; *Mauran* v. *Alliance Ins. Co.* (1867) 6 Wall. 1, 18 L. ed. 836.

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In *Fifield* v. *Insurance Co. of Pa.* (1864) 47 Pa. 166, 86 Am. Dec. 523, the taking of a vessel by a Confederate privateer was held to be a capture within a proviso exempting the insurer from liability "for any claim for or loss by seizure, capture, or detention, or the consequences of any attempt thereat," and not a loss by "pirates, rovers, and assailing thieves," for which the insurer would be liable.

And see also *Monongahela Ins. Co.* v. *Chester* (1862) 43 Pa. 491, where it was held that the forcible seizure of a steamer by armed men professing to act under and by authority of the Confederate States of America was covered by insurance against peril "of the seas, lakes, rivers, fires, enemies, pirates, assailing thieves, and all such losses and misfortunes which shall come from the damage of the said steamer Mohawk according to the true intent and meaning of this policy."

A warranty "free from capture and seizure and the consequences of any attempt thereof" is not confined to legal capture and seizure, but includes any capture in consequence whereof the ship is lost to the insured; and covers a case where a British vessel was fired upon and sunk by Russians, then at war with Turkey, in the alleged belief that she was a Turkish vessel. *Powell* v. *Hyde* (1855) 5 El. & Bl. 607, 25 L. J. Q. B. N. S. 65, 2 Jur. N. S. 87, 4 Week. Rep. 51.

The words, "capture and detention of princes," apply not only to takings by enemies or pirates, but to those made by friends or allies. *Murray* v. *United Ins. Co.* (1801) 2 Johns. Cas. 263.

In *Murray* v. *Harmony F. & M. Ins. Co.* (1870) 58 Barb. 9, it was held by Barnard, J., that the forcible taking possession of a vessel by officers of the government, with the purpose of employing it in the government service, although a capture, is not within a warranty by the assured "free from loss or claims on account of capture, seizure, detention, or destruction by or arising from any belligerent nation or from any seceding or revolting state or states of the Union, or from any guerilla party, or by or from any officer, civil or military, or other persons claiming to act in their name, or under their authority, or in their behalf." He held the insurer not to be liable, however, on the ground that there had been no abandonment. Ingraham, P. J., on the other hand, held that the seizure came within the exception in the policy, and Brady, J., concurred without stating the grounds for his conclusion.

A warranty "free from capture and seizure and the consequences of any attempt thereat" is not confined to a belligerent seizure, or a seizure by violence from without, but includes a taking and carrying away of the ship by Chinese emigrants. *Kleinwort* v. *Shepard* (1859) 1 El. & El. 447, 28 L. J. Q. B. N. S. 147, 5 Jur. N. S. 863, 7 Week. Rep. 227.

A warranty by the insured that the vessel shall be free from

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capture, seizure, or detention does not include a mutinous taking possession of the vessel by the mariners, especially where barratry is one of the risks expressly assumed. *Greene* v. *Pacific Mut. Ins. Co.* (1864) 9 Allen, 217.

An insurer against, *inter alia*, "barratry of the master" is protected by a warranty "free from capture and seizure, and the consequences of any attempt thereat," from liability for seizure and confiscation of the ship in consequence of the master's barratrous act in smuggling. *Cory* v. *Burr* (1883) 8 App. Cas. 393, 52 L. J. Q. B. N. S. 657, 49 L. T. N. S. 78, 31 Week. Rep. 894, 5 Asp. Mar. L. Cas. 109.

In *Johnston* v. *Hogg* (1883) 52 L. J. Q. B. N. S. 343, 10 Q. B. D. 432, 48 L. T. N. S. 435, 31 Week. Rep. 768, 5 Asp. Mar. L. Cas. 51, an action on a policy of insurance upon a ship in which the subject-matter was warranted "free from capture and seizure, and the consequences of any attempt thereat," it appeared that the vessel got ashore and was attacked by natives, who took forcible possession, drove away the master and crew, and plundered the vessel, damaging her so that she became a constructive total loss. It was held that though the intention of the natives in taking possession was only to plunder the cargo, and not to keep the ship, their acts constituted a "seizure" within the meaning of the warranty.

A warranty in a policy of marine insurance against "capture, seizure, and detention" operates to release the insurers from liability for a loss occasioned by a prohibition against entry of diseased cattle into the country. *Miller* v. *Law Acci. Ins. Co.* [1903] 1 K. B. 712, 72 L. J. K. B. N. S. 428, 51 Week. Rep. 420, 88 L. T. N. S. 370, 19 Times L. R. 331, 8 Com. Cas. 161, 9 Asp. Mar L. Cas. 386.

Sufficiency of circumstantial evidence to show that loss was due to excepted risk.

An insurer of a steamer under a policy excluding war risks discharges the burden of proving that the loss was due to an excepted risk by showing that the vessel was seaworthy, the weather fine, the voyage a familiar one which the master was in the habit of making, that there were no reported losses at sea about this time, and that a German submarine was in the neighborhood which torpedoed and sank two other vessels, and that a bottle had been picked up containing a paper with the words "Oriok torpedoed—sinking." *General Steam Nav. Co.* v. *Commercial Union Assur. Co.* (1915) 31 Times L. R. 630.

Where the subject of the insurance is lost after capture.

Somewhat the same situation as was involved in ANDERSEN v. MARTEN was presented in *Dole* v. *New England Mut. M. Ins. Co.*

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(1863) 6 Allen, 373. There a vessel warranted free from capture, seizure, or detention was taken by a Confederate cruiser during the Civil War, and, it being difficult to take her into port as a prize, her captors burned her. It was contended on behalf of the vessel owners that as the policy contained a provision that in case of capture or detention the insured should not have the right to abandon therefor until proof should be exhibited of condemnation or of the continuance of the detention by capture or other arrest for at least ninety days, and as within this period the ship was totally lost by fire, which was one of the risks insured against, the insurer was liable; but the court held that the liability of the insurer was terminated by the capture, saying: "The argument overlooks the effect of the exception created by the warranty. A loss by capture was excepted from the risks. When that event happened, the contract of the parties terminated. There is no stipulation in the policy that the insurers were to remain liable after the ship had passed into the hands of her captors. The clause limiting the right to abandon in case of capture until proof of condemnation, or until the detention has continued ninety days, is intended only to restrict the liability of the underwriter where he assumes the risk of capture, but it cannot be construed as extending his liability to a time subsequent to the capture, where that risk is excepted by the terms of the contract."

And in an action in a Federal court arising out of the same state of facts, it was held that the capture of the vessel, and not the fire, was the efficient and prevailing cause of the loss. *Dole* v. *New England Mut. M. Ins. Co.* (1864) 2 Cliff. 394, Fed. Cas. No. 3,966.

In *Collidge* v. *New York Firemen Ins. Co.* (1817) 14 Johns. 308, a vessel insured and warranted free from loss by the British or Americans, but in case of capture by either, the usual sea risks to continue, was captured by the British and while detained by them was lost in consequence of the negligence of the captors in mooring her in a dangerous and exposed situation where she was injured by several vessels running foul of her. It was held that if, after the capture, the ship had been lost by a sea risk strictly speaking, undoubtedly the underwriters would be answerable, but that as the immediate and proximate cause of the loss was an act of the captors which if done by the insured would have exonerated the insurer, the insurer was protected by the warranty.

And in *Magoun* v. *New England Marine Ins. Co.* (1840) 1 Story, 157, Fed. Cas. No. 8,961, it was said, *obiter*, that if there be a capture and before the vessel is delivered from that peril she is afterwards lost by fire or accident or negligence of the captors, the whole loss would be properly attributable to the capture.

In *Graham* v. *Pennsylvania Ins. Co.* (1807) 2 Wash. C. C. 113, Fed. Cas. No. 5,674, an action on a policy on goods on board a certain

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vessel, warranted by the assured free from any charge, damage, or loss which might arise in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade, it appeared that the vessel was taken by the British as prize on the allegation that she was taking on board mahogany of larger dimensions than was allowed to American vessels, and while being taken by her captor to Jamaica she, with the capturing vessel, was lost. The question in the case was whether, as a matter of fact, the vessel was engaged in illicit trade; and it was apparently conceded that the insurer would not be liable in case it should be found that the trade was illicit.

In *McCargo* v. *New Orleans Ins. Co.* (1845) 10 Rob. (La.) 202, 43 Am. Dec. 180, slaves shipped from one port of the United States to another were insured under a policy exempting the insurers from liability on account of losses which might be sustained in consequence of an insurrection or mutiny. The slaves attacked the white persons on board the vessel and compelled an officer to take the vessel into a British port, where they escaped. The court, in the course of deciding the question whether the loss was caused by the mutiny or by the action of the British authorities in permitting the slaves to go at large, said that if while the slaves were the masters of the vessel, and after the route of the original voyage had been abandoned, she had been wrecked upon one of the numerous British islands in that sea, either by force of a tempest or stranded intentionally by the mutineers, and they had dispersed themselves on shore within the exclusive operation of the British law, it could not be doubted that the efficient operative cause of the loss would be the insurrection.

In *Law* v. *Goddard* (1815) 12 Mass. 112, it was held that the loss of a ship by wreck while on her way to port in charge of a prize master was not the immediate and necessary effect of the capture so as to render an insurer against capture liable, where, by the terms of the policy, such liability was not to arise until condemnation or ninety days after capture.

In *Murray* v. *Harmony F. & M. Ins. Co.* (1870) 58 Barb. 9, it was said by Barnard, J.: "A capture is a total loss, subject to be defeated by a recapture, or relinquishment, unless the assured in case he is insured against capture, abandons before notice of the defeasance. Consequently, until such defeasance the vessel is a total loss to the assured. It being so, he has no concern with what happens to the vessel during the continuance of the capture, for it harms him not. Therefore, if he warrants free from capture, and the vessel is lost by capture, he cannot hold the assurers for a total loss on a peril assured against, happening during capture; for the vessel has not been lost to him by that peril, but by the capture."

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Where capture is a consequence of a peril insured against.

In *Livie* v. *Jansen* (1810) 12 East, 648, 11 Revised Rep. 513, an American ship insured from New York to London, warranted free from American condemnation, was, while attempting to elude the American embargo, driven on shore, where she sustained only partial damage; and was seized the next day and finally condemned by the American government for breach of the embargo. It was held that nothing was properly imputable to the sea damage but the deterioration of the ship and cargo, for though such sea damage might stop the progress of the voyage and so bring the ship and cargo within the reach and effect of some other distinct peril which they might otherwise have escaped, yet the substantive loss by that latter peril is imputable to such latter peril only, not to the previous sea damage.

In *Schieffelin* v. *New York Ins. Co.* (1812) 9 Johns. 21, a cargo was insured against "the dangers of the sea only; and in case of capture or detention the risk to continue during and after such capture or detention." The ship having sprung a leak, the master put into a Dutch port for repairs, where he was detained by an embargo. While lying in the Texel, and while so detained, a violent storm arose in consequence of which it was deemed necessary to run the ship on shore, whereby she was so much injured as not to be worth repairing. The cargo, having been discharged on board of lighters, was seized and detained by order of the Dutch government. It was held that there being no proof that the cargo was damaged by the stranding and loss of the ship to an extent which would warrant the insured in abandoning it as a constructive total loss, the loss was to be imputed to the seizure rather than to the stranding. Kent, Ch. J., in delivering the opinion of the court, said: "But suppose the policy was against capture only, and the vessel was captured and then shipwrecked, while in the hands of the captor, I should think the assured would have a right to abandon, and to maintain that his right to recover, as for a total loss, attached upon the capture, and that the subsequent casualty was one with which he had no concern. When the first loss is distinct, and so far as to justify an abandonment, which is accordingly made, and there is no after recovery to defeat it, the rights of the parties are fixed, and we are not to be casting our eyes forward to see what further perils awaited the property. Those inquiries belonged to the insurer, in whom the residuary interest has vested."

In *Green* v. *Elmslie* (1793) Peake, N. P. Cas. 212, 3 Revised Rep. 693, where a vessel was driven by a gale upon the enemy's coast and there captured, it was held that the proximate cause of the loss was the capture, and not the gale, since the loss would not have occurred had the ship been driven upon a friendly coast, and therefore that an insurer against capture only could not escape liability.

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In *Rice* v. *Homer* (1815) 12 Mass. 230, a vessel and cargo were insured by a policy providing that "the underwriters in case of restraint are exempted from plunder, waste, and expense, and from capture and condemnation by all powers, but they agree to take the dangers of the seas and the perils in the policy not excepted even while detained and afterwards." In the course of her voyage the vessel was so damaged by tempestuous weather that it became necessary to throw overboard part of the cargo, and she was obliged to put into a French port, where the vessel and the remaining cargo were seized and afterwards sold by order of the government. It was held that the capture, and not the sea perils by which the vessel was forced into port, was the proximate cause of the loss, and therefore that the insurer was not liable even to the extent to which the vessel and cargo had been damaged by the sea peril, though it was held liable for the portion of the cargo which had been thrown overboard.

In *Hahn* v. *Corbett* (1824) 2 Bing. 205, 3 L. J. C. P. 253, 9 J. B. Moore, 390, 27 Revised Rep. 590, the goods insured were warranted free from capture and seizure. The vessel in which they were carried was driven aground in such a situation that, assistance being lacking to take the cargo off, it became a constructive total loss. While aground, the cargo was seized as a prize. It was held that as the goods were lost when the ship was lost, what happened afterward made no difference in the case, as the goods must have been destroyed but for the enemy, who took them not to save them but to appropriate them. The case was distinguished from *Livie* v. *Jansen, supra,* upon the ground that in the latter case there was no total loss of the cargo by sea perils before seizure.

Where vessel is lost in endeavoring to avoid seizure.

Where a ship, to avoid seizure, runs to sea before it is properly loaded and is in consequence obliged to go to a port out of the direct course of the voyage insured, a warranty against capture and seizure in port will exonerate the underwriters from liability for a subsequent loss by shipwreck. *O'Reilly* v. *Royal Exch. Assurance* (1815) 4 Campb. 246, 16 Revised Rep. 786. E. S. O.

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[ENGLISH COURT OF APPEAL.]

HAMLYN *v.* JOHN HOUSTON & COMPANY.

[1903] 1 K. B. 81.

Also Reported in 72 L. J. K. B. N. S. 72, 87 L. T. N. S. 500, 19 Times L. R. 66.

Partnership — Principal and agent — Scope of authority — Tortious act of one partner — Liability of firm — Bribing servant to disclose employer's secrets — Partnership act 1890 (53 & 54 Vict. c. 39), § 5:

Where it was in the course of the business of the defendants, a firm of grain merchants, which consisted of two partners, to obtain by legitimate means information in regard to contracts made or tendered for with brewers or with buyers of grain by competing firms, and one of the partners obtained such information by bribing a clerk of the plaintiff, a competitor in business, to break his contract of service by dishonestly and improperly communicating to him knowledge obtained in the course of the clerk's employment:—

Held, that both the partners were responsible in damages to the plaintiff for the action of one of them as aforesaid, on the ground that it was within the general scope of the authority given to him as a partner to conduct the business of the firm.

(November 19, 1902.)

APPLICATION for judgment or a new trial in an action tried before Kennedy, J., and a jury.

The action was brought to recover damages against the defendants, in substance, for having induced a clerk in the plaintiff's employ to break his contract of service with the plaintiff by disclosing confidential matters with regard to the plaintiff's business, whereby damage was occasioned to the plaintiff.

The plaintiff and the defendants were grain merchants. The defendants' firm consisted of one Houston, and one Strong, who by arrangement between them left the conduct of the business to Houston. It was a term of the clerk's employment by the plaintiff that he should not divulge the secrets of his employer relating to his business. It appeared that Houston had induced the clerk by bribes to give him information with regard to the names of plaintiff's customers, and contracts made, or tendered for, by

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the plaintiff, and to allow him to have possession of one of the plaintiff's books containing entries concerning contracts. In answer to questions left to the jury by the learned judge they found as follows: 1. Houston did [82] induce and procure the plaintiff's clerk to break his contract of service with the plaintiff by dishonestly and improperly communicating to Houston knowledge obtained by him in the course of his employment in the plaintiff's office in regard to secret and confidential matters of his employer's business. 2. Damage was thereby occasioned to the plaintiff to the amount of 750*l.* 3. Houston so acted in order to obtain advantage in business for the defendant firm, and believing that action to be for the interest of the defendant firm. 4. It was in the course of the business of the defendant firm to obtain by legitimate means information in regard to the contracts made or tendered for with brewers and with buyers of grains by competing firms. 5. The moneys paid by Houston to the clerk were paid for or in consideration of the information which the clerk obtained for him as before mentioned. 6. The said moneys were the moneys of the defendant firm. 7. The defendant firm profited by what Houston did.

Upon these findings the learned judge entered judgment for the plaintiff for 750*l.*

E. Tindal Atkinson, K.C., and **G. Spencer Bower,** for the defendants. The action being against the firm, the question really is whether the defendant Strong is responsible as a principal for what the defendant Houston did, as being within the scope of the authority given by one partner to another. The provisions of the partnership t 1890, § 5, show that the test whether a partner is responsible for an act done by another partner is whether the act is done "for carrying on in the usual way business of the kind carried on by the firm." See also § 7 of the act. To procure information as to the secrets of a rival firm by bribing their clerk cannot be said to be an act done for carrying on in the usual way business of the kind carried on by the defendants. This is not an action brought to recover money or some other subject-matter in the defendants' possession, of which the plaintiff had been deprived through the action

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of Houston, as to which different considerations might apply; it is an action to recover damages from both the defendants in respect of Houston's acts, which must therefore [83] be shown to be in law the joint acts of the defendants. This is not a question of an agent employing unlawful means in pursuit of some lawful object within the general scope of his authority. The end proposed was in itself wrongful; namely, the procuring —it might be called stealing—of information which was really the private property of someone else. A charge of illegal conspiracy might have been maintained in respect of what was done. It is impossible to suppose that it was really in the usual course of defendants' business to obtain information as to the secrets of rival firms; and, even if it was within the scope of Houston's authority to obtain information, if possible, as to the contracts and tenders made by the plaintiff by legitimate means, it does not follow that it was within the scope of his authority to obtain such information under circumstances in which doing so really amounted to stealing it. It may be within the scope of a partner's authority to obtain money for the purposes of the firm; but it would not therefore be within the scope of his authority to steal money. The case is not like one in which an agent makes a fraudulent representation in the course of a transaction which it was clearly in the ordinary course of the business of his principal to carry out. Cases of this kind may be divided into three classes, in two of which the principal is responsible for the acts of the agent, while in the third he is not. The first is where the object which the agent has in view is within the general scope of his authority, and is lawful; and the means employed by him, though exceeding his authority as between himself and his principal, are lawful. The second is where the object which the agent has in view is within the general scope of his authority, and is lawful; and it may be obtained either by lawful or unlawful means, and the agent has used unlawful means. The third is where the object which the agent has in view is in itself unlawful. Here the object which the agent or partner had in view was unlawful and wrongful, namely, procuring information as to the secrets of a rival firm, information which was really their property; and the means employed were

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unlawful. In *Dyer* v. *Munday* [1895] 1 Q. B. 742, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week. Rep. 440, 59 J. P. 276, the criminal act was merely [84] incidental to the object in view, which was lawful. In this case the object itself was unlawful.

[They also cited *Limpus* v. *London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; *Poulton* v. *London and South Western Ry. Co.* (1867) L. R. 2 Q. B. 534, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309.

Ruegg, K.C., and **Montague Shearman**, for the plaintiff, were not called upon to argue.

Collins, M.R.: The decision of the learned judge in this case was, in my opinion, right. The defendant Strong appears to have been a sleeping partner in a firm consisting of himself and the defendant Houston, or, at any rate, he delegated the transaction of the whole of the firm's business to Houston. The jury have found that it was in the course of the business of the firm to obtain by legitimate means information in regard to contracts made or tendered for with brewers and with buyers of grains by competing firms. What Houston did for the purpose of obtaining information, which, according to the finding of the jury, it was within the scope of his authority to obtain by legitimate means, was to bribe the clerk of the plaintiff, who was a competitor in business, to give him access to documents belonging to the plaintiff; indeed, it would appear that he actually had possession of one of the plaintiff's books for a time. It was argued for the defendants that this action by Houston was so completely outside the scope of the authority given to him that the defendants' firm cannot be responsible for it in an action brought against them by the plaintiff for damages thereby occasioned to him. The defendants' counsel have endeavored to frame a definition with regard to what is and what is not within the scope of an agent's authority so as to render his principal liable. They suggested that, where the end sought to be obtained by the agent is in itself illegal, and the means employed to accomplish it are

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illegal, it cannot be said that the action of the agent is within the scope of the general authority given to him to conduct a business, but that it is otherwise where the end and the means employed are legal, or where the end is legal and the means of obtaining it may be legal or illegal. Trying this case by the test so suggested, was the end [85] to be obtained here in itself illegal? The defendants' counsel say that it was, but it does not appear to me to be so. According to the finding of the jury it was part of the defendants' business to obtain information as to the contracts and tenders of competitors in business, and, the more secret these matters were, the greater was the value of that information to the defendants' firm. The jury have in effect found that it was within the scope of the authority given to Houston to obtain such information by legitimate means, and I do not see that there was anything illegal in so obtaining it. It is too well established by the authorities to be now disputed that a principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him, and even the fact that the act of the agent is criminal does not necessarily take it out of the scope of his authority. If the act done by the agent is within the general scope of the authority given to him, it matters not for the present purpose that it was directly contrary to the instructions of his principal, or even that it may have been an offense against society itself. The test is that which is applied to this case by the learned judge. Was it within the scope of the authority given to Houston to obtain this information by legitimate means? If so, it was within the scope of his authority for the present purpose to obtain it by illegitimate means, and the defendants are liable. That is the law as expressed in the partnership act 1890, and as laid down by decisions previous to that act, in which it has been held that a principal is liable for the fraud or other wrongful act of his agent if committed within the scope of his employment. This doctrine does not appear to rest upon the notion of the principal's holding out the agent as having authority. The grounds upon which it seems to rest, as explained in cases such as *Barwick* v.

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English Joint Stock Bank (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, appear to be that the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal; and that, the principal having delegated the performance of a certain class of [86] acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him. For these reasons I think this application must be dismissed.

Romer, L.J., concurred.

Mathew, L.J.: I agree. A little confusion has been introduced into this case by the reference made to the criminal law. It is not suggested that Houston's partner would be liable criminally; the question is only one of civil liability. The rule of law applicable is perfectly plain. The question is whether the action of Houston was within the scope of his authority for the purpose of making the firm liable. I think the jury were entirely warranted in finding that Houston was authorized to obtain information as to the contracts and tenders made by competing firms by legitimate means. He did obtain such information by illegitimate means. It being within the scope of his authority to procure the information, it is immaterial for the present purpose whether the acts which he committed in order to procure it were fraudulent or even criminal or not, and his partner is responsible for those acts.

Application dismissed.

Solicitors for plaintiff: *Wood & Wootton.*
Solicitor for defendants: *C. T. Wilkinson.*

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Note.—Liability of partnership or corporation for tort committed by partner or agent with the object of procuring business.

Although there are a number of cases which hold that one partner is not presumed to concur in the tort of a copartner which is clearly illegal, although connected with partnership affairs, the view generally accepted is that liability exists if the act is within the scope of the wrongdoing partner's authority. A like rule applies in the case of torts committed by officers or other agents of a corporation. It is accordingly a crucial question whether or not the tort was committed within the scope of the authority of the partner or agent. HAMLYN v. HOUSTON is of interest as bringing out the point that a wrongful act may be within the scope of the implied authority of a partner or agent if it was committed to secure an object which would be within the scope of such authority if attained by legal means.

In *Pennsylvania Iron Works Co.* v. *Henry Vogt Mach. Co.* (1906) 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 139 Am. St. Rep. 504, 96 S. W. 551, it was held that the act of the manager of a branch office of a corporation in writing a letter containing libelous statements as to a business rival, for the purpose of obtaining for his principal a certain contract, was within the scope of his employment, and therefore that the corporation was liable for his acts, although the libelous statement was not known or assented to by it.

So, also, in *Haney Mfg. Co.* v. *Perkins* (1888) 78 Mich. 1, 43 N. W. 1073, a partnership was held liable for slanderous statements made by one partner the purpose of which was to aid the partnership business by preventing another party from making sales of an article which the partnership was at the time selling.

In *Citizens Life Assur. Co.* v. *Brown* [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176, an insurance agent formerly in the employ of the defendant company, after leaving it and entering the service of a rival, endeavored to induce certain policy holders in the defendant company to leave it and to insure in the rival company, and for the purpose of bringing about such a result made statements derogatory to the defendant company. A superintendent of agencies in the employ of the defendant company, learning of this, sent out a circular letter contradicting such derogatory statements, in the course of which he made statements defamatory of the recreant agent. It was held that the jury were warranted in finding, from evidence tending to show that it was within the scope of the authority and employment of the superintendent of agencies to secure business, and save business, and exercise a general supervision over the company's business, that the defamatory statements were made in the course of his employment,

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and therefore that the insurance company was liable, although he had no actual authority, express or implied, to write libels or do anything legally wrong.

In *Kane* v. *Boston Mut. L. Ins. Co.* (1908) 200 Mass. 265, 86 N. E. 302, in which the question was whether an insurance company might be held liable for defamatory statements made by divers of its soliciting agents regarding an agent in the employ of a rival company, it was held that in the absence of evidence of actual authority given by the defendant to its solicitors to make the slanderous statements, or that they were made with its knowledge or had been ratified by it, or of anything to show that what was said by the solicitors was said in the course of their employment or while acting in the apparent scope thereof, there was no error in directing a verdict for the defendant, the court remarking that it was difficult to say that such a wrong could be committed in the agent's service and for the principal's benefit so as to impose upon the principal a liability therefor.

For annotation of the general question of "Liability of partnership for torts," see 51 L.R.A. 463. E. S. O.

[NOVA SCOTIA SUPREME COURT.]

BOORSTEIN *v.* MOFFATT et al.

36 N. S. 81.

Statute of frauds — Promise to be answerable for debt of another — Form of action — Pleading.

In an action brought by plaintiff against the defendants M. and G. for work done, and materials provided by plaintiff for defendants, at defendants' request, the evidence showed that the defendant G. entered into a contract with the defendant M. for the building of a house, and that the defendant M. employed plaintiff to do the work of painting and glazing. M. failed to make payments to plaintiff as agreed, and plaintiff thereupon went to G., who told him to go ahead and he would see him paid.

***Held*, that as there was no evidence to show that the defendant M. was to be discharged, the promise made by the defendant G. was within the 4th section of the statute of frauds, and, not having been made in writing, could not be enforced.**

***Held*, that, in view of the form of action, there was no necessity for**

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pleading the statute, and that judgment was rightly given in favor of the defendant G.

(April 11, 1903.)

Before Weatherbe and Townshend, JJ., Graham, E.J., and Meagher, J.

THIS was an appeal from the judgment of Dodd, C.C.J., in favor of the defendant Gillis, in an action by plaintiff for work done and materials provided. The defendant Moffatt entered into a contract with the defendant Gillis to build a house, and employed plaintiff to do the painting and glazing. Moffatt having failed to make payments as agreed, plaintiff went to see Gillis about it, who told him to go ahead and he would see him paid.

The learned judge, following *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 360, gave judgment in favor of the defendant Gillis, holding that if he was liable at all it was on his promise, and that this, to be binding, should have been in writing.

J. A. Chisholm, in support of appeal. There was a contract made with Gillis, without respect to Moffatt. The contract between Boorstein and Gillis is not within the statute of frauds; it is an independent contract between them. It was a question of law whether this agreement required to be in writing or not. [**82**] De Colyar on Guarantees, 130; *Fitzgerald* v. *Dressler* (1859) 7 C. B. N. S. 374, 29 L. J. C. P. N. S. 113, 5 Jur. N. S. 598, 7 Week. Rep. 190; *Scotson* v. *Pegg* (1861) 6 Hurlst. & N. 295, 30 L. J. Exch. N. S. 225, 3 L. T. N. S. 753, 9 Week. Rep. 280. To be within the statute there must be no previous liability on the part of the promisor. Under our lien law there was a liability upon Gillis for the work done. *Sutton* v. *Grey* [1894] 1 Q. B. 285, 63 L. J. Q. B. N. S. 633, 9 Reports, 106, 69 L. T. N. S. 673, 42 Week. Rep. 195; *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 360. The latter case does not dispose of the issue in this case. *Harburg India Rubber Comb Co.* v. *Martin* (1902) 71 L. J. K. B. N. S. 529, 3 B. R. C. 596, [1902] 1 K. B. 778, 50 Week. Rep. 449, 86 L. T. N. S. 505, 18 Times L. R. 428; *Fish* v. *Thomas* (1855) 5 Gray, 45, 66 Am. Dec. 348; Browne on Statute of Frauds, 5th ed. § 164. Gillis was not a

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stranger to the contract, but had a special interest in having it carried out. R. S. N. S. (1900) chap. 171.

C. J. Burchell, *contra.* None of the witnesses heard anything but the mere words, which may have had reference merely to the painting of the pantry, and the trial judge has so found. 1 Smith, Lead. Cas. 286. If there is a third party liable, the case is within the statute. There is nothing raised in the case with reference to a mechanics' lien. Plaintiff could have no lien until he recorded it. R. S. N. S. (1900), chap. 171, § 8, subdiv. sec. 2. If, when the conversation was had, Gillis had paid Moffatt 85 per cent of the work, all plaintiff could have a lien for would be 15 per cent. *Harburg India Rubber Comb Co.* v. *Martin* [1902] 1 K. B. 778, 3 B. R. C. 596, 71 L. J. K. B. N. S. 529, 50 Week. Rep. 449, 86 L. T. N. S. 505, 18 Times L. R. 428; *Gill* v. *Herrick* (1873) 111 Mass. 501; *James* v. *Balfour* (1882) 7 Ont. App. Rep. 461.

J. A. Chisholm, in reply. If our evidence is accepted, any payments that Gillis made after the conversation with Boorstein were not payments made in good faith.

Graham, E.J.: In considering the necessity of the defendant pleading the statute of frauds, everything depends upon the form of the action, and, for greater accuracy, I transcribe it:—

Statement of Claim.

The plaintiff's claim is against the defendants for work done and materials provided by the plaintiff to and for defendants at defendant's request.

[83] 1901. Particulars.

Nov. 2.—To amount due for painting and glazing house of defendant, Duncan Gillis	$115.00
Nov. 2—To extras, as per agreement	11.00
Amount due	$126.00
Plaintiff claims	126.00

Now, who can doubt that the plaintiff was proceeding, not upon a guaranty, oral or written, but upon a promise, express

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or implied, to be primarily liable for the work? It is an action for work done for the defendant at defendant's request.

If the plaintiff had declared on a guaranty, then, if the defendant intended to rely upon its not being in writing under the statute of frauds, he would have been obliged to plead it. But, as the plaintiff did not do so, the defendant is not obliged to plead to this effect; namely, that, although you are going against me as a debtor primarily liable, you really ought to go against me as a guarantor, or one secondarily liable, and, to that case, I plead the statute of frauds.

If the plaintiff amends, to enable him to recover against the defendant as a guarantor, then the defendant will no doubt plead the statute of frauds. But, until that happens, the only question to be decided is whether the promise made in this case was a promise to be primarily liable for the work, or only to be collaterally liable. The one form of action will be found under appendix A to the judicature act, part 3, § 2; the other under § 4, Damages and other Claims,—"The plaintiff's claim is for breach of a contract of guaranty for A. B." And the forms of statement of claim will be found in appendix C, § III, numbers 9 and 10.

So that the question is, after all, simply whether the plaintiff has made out an original liability of the defendant to pay for the work and materials.

[84] Coming, then, to the facts. Boorstein agreed with Moffatt to paint and glaze a house for Moffatt, which Moffatt had contracted with the defendant Gillis to build for him. The painting and glazing contract was for $115. The first payment of $25 was to be made when the priming coat was put on. When it was put on the plaintiff asked Moffatt for payment of that sum, and Moffatt said he had not got the money yet but would pay it when he had. He went to Moffatt again, and, not getting the money, he went to Gillis, who said he had nothing to do with him,—he had given the contract to Moffatt. And he says he said to Gillis, "If I don't get the money I will have to stop work." Gillis said, "Go ahead and I will see you paid."

This the defendant denies. It appears that Moffatt supplied the glass. In respect to the $25, already payable, there is no

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evidence to show what arrangement was made about that, or tending to show that Moffatt's contract with Gillis, or liability thereon, was rescinded, or that Moffatt was discharged from its performance. On the contrary, Moffatt himself, called by the plaintiff, proves that Gillis paid him in full on the contract. Indeed he says in cross-examination:

"Gillis paid me for the painting and glazing plaintiff did. . . . Plaintiff told me about six weeks ago Gillis had guaranteed it. Got last money from Gillis before plaintiff told me Gillis had guaranteed payment."

So that it is plain from the evidence that the original liability of Moffatt remained. The importance of this consideration is dealt with in *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 363, when considering the effect of these equivocal words, "I will see you paid." The case of *Lakeman* v. *Mountstephen* (1874) L. R. 7 H. L. 17, 43 L. J. Q. B. N. S. 188, 30 L. T. N. S. 437, 22 Week. Rep. 617, 6 Eng. Rul. Cas. 285, was before the learned judge who gave the judgment. In respect to the $25 already due, what other can the alleged parol promise of the defendant be than that of a promisor to answer for the debt of another?

[85] It is clear that in *Lakeman* v. *Mountstephen* there was no third person liable as a principal debtor,—no outstanding contract, as here. It is also clear that it is for a jury to say whether the equivocal words, "I will see you paid," are to be construed, under the circumstances, as importing primary or collateral liability, and the learned trial judge has disposed of the matter.

In *Barber* v. *Fox* (1816) 1 Starkie, 270, where the defendant promised an attorney that "if he would continue to act for another in certain legal proceedings, he would pay him whatever was to be paid," it was held that the statute of frauds applied. Lord Ellenborough said: "This was the inchoate business and debt of another, and if the defendant had promised in writing he would have made himself liable; without a promise in writing he is not liable."

Something was said at the argument about this promise not being within the statute of frauds, because the plaintiff might have put on a mechanics' lien, and, under well-known authorities,

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if the defendant, to obtain release from a mechanics' lien, had made the promise, it need not be in writing.

There are two answers—one I have already given—that is, that it is an action for work done by the plaintiff for the defendant at the defendant's request, and not upon any such promise. And the other is that there was no mechanics' lien placed upon the building, or in the contemplation of the parties, when the alleged oral promise was made.

The appeal should be dismissed, with costs.

Townshend, J.: "The plaintiff has sued the defendants for work done, and materials provided by the plaintiff to and for the defendants at defendants' request." The defendant Moffatt suffered judgment by default. The defendant Gillis resists the claim, denying that plaintiff did the work or furnished the materials for him, and denying any indebtedness [86] to him at all. On this issue the case went to trial, resulting in judgment for the defendant Gillis. The learned judge, without directly finding whether Gillis made the promise alleged, decides that, if such a promise was made, the original liability of Moffatt to the plaintiff was never extinguished, that it continued until discharged, the onus of which lay on the plaintiff, and, as a consequence, if made at all, it was only a promise to answer for the debt of another person, which promise, under the statute of frauds, must be in writing. It was a question for the jury—here for the judge—to say whether, on the evidence, defendant Gillis agreed to become primarily liable to plaintiff.

Even assuming, in plaintiff's favor, that the defendant Gillis made the alleged promise to pay for the work if plaintiff would go on and finish it, and that, on this understanding, plaintiff did so, in the absence of any evidence that Moffatt was, at the same time, discharged from any further liability, the learned judge, in my opinion, has correctly interpreted the law. The evidence on the principal question was very contradictory, but none was offered to show the release of Moffatt from a contract on which he was undoubtedly liable. In De Colyar on the Law of Guarantees, p. 109, he says:

"Moreover, the question to whom the credit was given is not

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an infallible test, by which to discover in all cases whether or not the promise falls within the 4th section of the statute of frauds. For sometimes it happens that credit is entirely given to the promisor, and yet the promise is within the 4th section of the statute of frauds. This is the case wherever the promise has not the effect of discharging the original debtor." Lord Ellenborough in *Barber* v. *Fox* (1816) 1 Starkie, 270, said: "This was the inchoate business and debt of another, and if the defendant had promised in writing, he would have made himself liable, —without a promise in writing he is not liable." The case of *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 360, bears a [87] very strong resemblance to the facts here, and, I think, the learned judge did right in following it. In this view it is immaterial that he has made no direct finding on the point whether Gillis made the promise or not—impliedly, of course, he decides that he did not, but if he did, Gillis would still not be responsible when Moffatt remained liable, unless he put his promise in writing.

It has been suggested that this latter defense will not avail Gillis, because not pleaded. The very obvious answer to this objection seems to me to be that the plaintiff did not sue on a contract of guaranty, and, therefore, there was no necessity of pleading the defect. He was sued on a contract for work and labor performed, and the simple issue was whether he had made such a contract. In the course of the evidence it came out that even if he did make such an agreement, the original debtor remained liable, and it would, for that reason, come within the 4th section of the statute of frauds. This, in effect, is the decision of the Supreme Court of Canada in *Kent* v. *Ellis* (1900) 31 Can. S. C. 110, 2 B. R. C. 721, on appeal from this court. Gwynne, J., at p. 120, says: "Until the defect became apparent he could not have been required to point out a defect of which he cannot be assumed to have been aware." So, in this case, there was nothing in the statement of claim to inform him that plaintiff would seek to make him responsible as a guarantor. On the contrary he was sued with Moffatt as primarily and directly liable on the contract.

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I am, for these reasons, of opinion the decision below was right, and that this appeal must be dismissed, with costs.

Weatherbe, J., concurred that the appeal must be dismissed with costs.

Meagher, J., stated that he had prepared an opinion, but would not read it. He was not entirely convinced that it was not necessary to plead the statute.

Appeal dismissed, with costs.

Note.—Language used by owner or other person interested in construction of building, importing a promise to pay a subcontractor, materialman, or employee of contractor, as a promise to answer for the debt or default of another.

I. Introduction, 96.
II. Promises to pay for work thereafter to be performed or materials subsequently to be furnished:
a. In general, 98.
b. "I will see you paid," 99.
c. Promise to pay out of money in promisor's hands, 103.
d. Promise to pay if contractor does not, 105.
e. Miscellaneous, 106.
III. Promises relating to indebtedness of contractor then existing:
a. In general, 109.
b. Promise to pay if promisee will continue performance, 110.
c. Promise to pay if promisee will refrain from filing lien, 113.
d. Promise to pay out of money in promisor's hands belonging to debtor, 114.

I. Introduction.

Promises of the kind with which this note has to deal are of two sorts: First, those relating to work thereafter to be performed or materials subsequently to be furnished; second, those relating to an indebtedness already incurred by the contractor. It is believed that the discrepancy among the cases is to a considerable extent due to a failure to distinguish between the two classes of promises. Where the promise relates to a performance in the future, the test which determines whether the promise is a collateral undertaking within the statute of frauds, or whether it is an original undertaking, and so not within the statute, is whether the performance was upon the credit of the original contractor or upon the credit of the owner. It

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is accordingly a material circumstance that the original contractor continues liable, since if he does so it is evident that the work was done or the material furnished in fulfilment of the old contract, and not as a performance of a new contract made with the owner. But where the promise relates to an indebtedness already incurred by the original contractor, it is (according to the weight of authority, at least) immaterial that the original contractor is not released from liability, since a promise to pay the debt of another may be an original promise if it is supported by an independent consideration. Nevertheless in many cases of the latter sort, the courts have treated the continuance of the liability of the original contractor as conclusive of the collateral character of the owner's promise, holding it to come within the operation of the statute unless the transaction was such as to amount to a novation whereby the liability of the owner is substituted for that of the contractor. On the other hand, the courts in cases of the other kind, where the promise is to pay for work performed or material to be furnished thereafter, have sometimes fallen into the equal error of supposing that because the continuance of the liability of the contractor is immaterial where a promise to pay an existing indebtedness is in question, it is likewise immaterial where the promise relates to a future performance, overlooking the fact that the performance must be of one or the other of the two contracts, and cannot at one and the same time constitute a consideration for both.

Another difference between the two sorts of promises is this: Where the promise is to pay for services to be rendered or goods to be delivered, the rendition of the services or the delivery of the goods on the credit of the promisor constitutes a consideration in itself, and it is unnecessary to seek for any new and independent consideration in the benefit derived from an uninterrupted supply of materials or performance of labor in order to support the promise; while where the promise is to pay an existing indebtedness of the original contractor, a new and independent consideration is essential to prevent the owner's promise from being of a collateral character and so within the statute of frauds. In this connection it may be observed that though many courts profess to find such new and independent consideration in the continuance of the promisee to perform labor or to furnish material, so as to render a promise to pay for labor previously performed for or material furnished to the original contractor as well as to pay for labor or material thereafter to be furnished on the credit of the promisor an original undertaking, it seems to the writer that the continued performance which constitutes the consideration for the promise to pay therefor cannot be considered also in the light of a new and independent consideration for the promise to pay for work previously done for or material furnished to the con-

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tractor. The continuance of the performance undoubtedly furnishes a consideration to support the latter promise as a contract, but because it constitutes a consideration, it is not necessarily a new and independent consideration which will demonstrate the promise to pay the existing indebtedness of the original contractor to be an original rather than a collateral undertaking.

In determining whether a promise by the owner or other person interested in the completion of a building to stand responsible to a subcontractor or materialman or the employee of a contractor is an agreement to answer for the debt or default of the contractor,—or, in other words, to pay if the contractor does not,—and so within the provision of the statute of frauds requiring such promisees to be in writing, or whether it is an original promise, the assumption of a direct liability, and so not within the statute, the test to be applied is, What was the intention of the parties?

Thus in *Birchell* v. *Neaster* (1881) 36 Ohio St. 331, it is said that the line which divides promises which are original and unconditional from those which are collateral and conditional, especially when the subject-matter of the contract is the pre-existing debt of another, is sometimes very difficult to trace. The difficulty generally arises in ascertaining the true intent and meaning of the parties; but when these are ascertained, the plain meaning of the words of the statute must prevail.

II. Promises to pay for work thereafter to be performed or materials subsequently to be furnished.

a. In general.

Where the promise is to pay for work thereafter to be performed or materials subsequently to be furnished, the material question for inquiry is, To whom is credit extended, the principal contractor or the owner? In arriving at the intention of the parties, the language used by the promisor is given considerable weight, and is construed in accordance with the usual meaning of the terms employed, unless the surrounding facts and circumstances and the conduct of the parties show that it was used in a different sense. The intention of the parties should be gathered from the entire transaction, and will control regardless of the language used in creating the obligation. Where the language used, together with the surrounding facts and circumstances, renders it doubtful whether the parties intended by the promise to create an original or a collateral obligation, the intention should be determined by the jury. See note in 15 L.R.A.(N.S.) at page 216.

If there is any doubt about the import of the language used, resort

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may be had to the circumstances of the case to ascertain the intention of the parties at the time. *Clay* v. *Walton* (1858) 9 Cal. 329.

In construing such promise, the fact that the promise is made by one having a pecuniary personal interest in the transaction is often controlling in stamping it as an original undertaking. *Almond* v. *Hart* (1899) 46 App. Div. 431, 61 N. Y. Supp. 849.

But the mere fact that the promisor may have an interest which a promisor has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise; and the interest in the principal contract, or the benefit to be gained by its performance, become matters of consideration only as they may serve to determine that character. *Clay* v. *Walton, supra.* In *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 360, it was said that there could be no doubt that the performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person, if the latter derives benefit from the performance, but that the question whether a particular case comes within the statute depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property except such as arises from his express promise.

Part payment is a circumstance confirmatory of the original character of the promise. *Almond* v. *Hart, supra.*

b. "I will see you paid."

See also in this connection, *Sinclair* v. *Richardson,* set out under III. b, *infra.*

The expression, "I will see you paid," is equivocal. It is, without more, such an expression as will afford evidence under particular circumstances of an original promise. *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 360.

In *Gable* v. *Graybill* (1895) 1 Pa. Super. Ct. 29, it is said that there are cases where the words, "I will see you paid," have been construed, in the light of the pertinent facts, to be an original undertaking, and other cases where the same words have been construed to be a collateral undertaking and within the statute; that there is no irreconcilable conflict between these cases, since, though the words are not unimportant in ascertaining the intent, the circumstances of the transaction, and not the words alone, determine whether the promise is within the statute.

Whether the form of expression, "I will see that you are paid," is or is not a collateral promise necessarily depends upon circumstances surrounding the making of such promise. The real test is,

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to whom was credit given. *Mulholland* v. *Jones* (1912) 83 N. J. L. 604, 83 Atl. 875.

Where the owner of the building under construction tells a materialman, who is doubtful about supplying any more lumber to the contractor, that if he will continue to furnish it the owner will see that it is paid for when the job is finished, such undertaking is not collateral, but original. *Sext* v. *Geise* (1888) 80 Ga. 698, 6 S. E. 174.

Where a materialman furnishing materials to a contractor, apprehending trouble in getting his pay, went to see the owner and told him that he would not furnish any more materials unless he, the owner, would secure him, and the owner told him to go on and furnish the necessary materials to finish the building and he would see that he got his money, and relying upon this statement the materialman went on and furnished the material necessary to finish the building, it was held that the promise was an original one, but that recovery could be had only for materials furnished subsequent to the making of it. *Berkowsky* v. *Viall* (1896) 66 Ill. App. 349.

In *Rand* v. *Mather* (1853) 11 Cush. 1, 59 Am. Dec. 131, where the owner told the subcontractors, who had become alarmed about their pay, to go on and he would see them paid, it was held that the promise, though void as to the work done before such promise was made, was valid with respect to the work done afterwards.

In *Almond* v. *Hart* (1899) 46 App. Div. 431, 61 N. Y. Supp. 849, where the evidence showed that employees of the contractor, soon after commencing work, asked the owner whether there was money enough left in the job to pay them, and that he replied that "there was money enough left in the job to finish it; go ahead and finish the work and I will see that you get your pay," it was held that as the owner was interested in the prosecution of the work, and had assumed to be responsible to the contractor's employees, who had performed labor in reliance upon that promise, the undertaking was not a collateral one; and that the fact that the liability of the contractor remained unaffected by the promise of the owner did not bring the case within the inhibition of the statute, the court saying: "The payment of the plaintiff's claim would necessarily result in the liquidation of any demand he might have against the contractor; but that has no effect on the defendants, for their liability rests upon a consideration, moving to them, which was the work on their building and for their benefit; and the ulterior effect that their unequivocal promise to pay might have upon the original demand is unimportant, as their promise is also an original one, entirely independent of the one made with the contractor."

In *Desmond* v. *Schenck* (1899) 36 App. Div. 317, 55 N. Y. Supp. 251, evidence that where, after the principal contractor stopped work,

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a subcontractor stopped also, and the owner promised the latter that if he would resume work, he would see that he was paid for it, was held to authorize a finding that the promise constituted an independent contract for the doing of the work.

In *Block* v. *Galitzka* (1906) 114 App. Div. 799, 100 N. Y. Supp. 173, evidence that a subcontractor, soon after beginning work, told the owner that he did not feel safe in regard to his payments, and did not care to go on with the work without an understanding that the owner would guarantee his payment, to which the owner replied, "All right; if that is the case I will see that you are paid;" and that between that time and the completion of the work the subcontractor spoke to the owner several times with reference to payment for his work, and was told, "Don't fear; I will take care of you;" and that the subcontractor completed his work on the faith of this agreement, having no communication with the contractor thereafter,—was held to establish a valid and enforceable contract.

In *Warnick* v. *Grosholz* (1858) 3 Grant, Cas. 234, where painters employed by a contractor refused to proceed because of the contractor's failure to do certain work for them which was to compensate them for the painting, and the owner told them to "go on with the work, that he had security for the building, and that he would see it paid," it was held that the jury were warranted in finding that the words used under the circumstances above indicated imported a direct undertaking rather than a collateral guaranty of the contractor's promise.

In *Bond* v. *Treahey* (1875) 37 U. C. Q. B. 360, where one having a subcontractor to do the brick work on a building hesitated to do the work through doubt of the contractor's ability to pay, it was held that as there was nothing to show that the liability of the principal contractor to pay for the brick work was ever extinguished, the promise of the owner, made under the circumstances above described, that he would see him paid, was within the statute.

In *Jenkins* v. *Lundgren* (1899) 85 Ill. App. 494, it was held that a promise by one for whom a house was being constructed that he would see that certain brick furnished the contractor was paid for was, in view of the circumstance that credit was not given to him alone, and that the brick was furnished upon the order of the contractor, not an original promise.

A promise by a woman on whose land a house was being erected under a contract with her husband, that she would see the contractor paid for his work, is not an independent undertaking, but a collateral promise to answer for the debt and satisfy the undertaking of her husband. *Thwaits* v. *Curl* (1896) 6 B. Mon. 472.

Where, in consequence of the failure of the contractor to make payments, the subcontractor abandoned the job, but resumed work

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upon the owner's promise that if he would continue the same to completion, he, the owner, would pay him, or would see him paid, it was held that as the evidence showed that the subcontractor still looked to the contractor for his pay, and not to the owner except as surety or guarantor, the agreement was within the statute. *Bresler* v. *Pendell* (1864) 12 Mich. 224.

In *Payne* v. *Baldwin* (1853) 14 Barb. 570, where it appeared that a materialman became dissatisfied and refused to furnish any more materials, and that thereupon the president of the company for whom the building was being erected told him to "go on and furnish the stuff, and he would see it was paid for," it was held that as the parties had proceeded on the theory that the contractor was the party originally liable, the undertaking above set forth was a collateral one.

A promise by the owner of the building made to a subcontractor, who had become fearful that he would not get his pay, that if he would go on and finish the job according to contract, he, the owner, would see that the subcontractor did not lose anything by it, that he would see that he got his pay, is within the statute. *Brown* v. *Weber* (1868) 38 N. Y. 187.

A promise by the owner of the building to see that the contractor will pay the workmen is within the statute. *Diringer* v. *Moynihan* (1890) 32 N. Y. S. R. 693, 10 N. Y. Supp. 540.

In *Birchell* v. *Neaster* (1881) 36 Ohio St. 331, where one having a subcontract to plaster a house, and who had nearly completed the job, told the owner that he would not go on and finish unless she would pay him, and the owner said to him, "You go on and finish the plastering and I will see you paid,"—it was held that when words so spoken were construed in the light of the circumstances, there could be no doubt that they only meant nothing more, and were so understood by the subcontractor, than that she would see that the contractor paid the subcontractor's claim, or, in other words, that she would pay the subcontractor if the contractor did not; and that the fact that at the time the verbal promise was made the owner was indebted to the principal contractor in a sum greater than the amount of the subcontractor's claim did not take the promise out of the statute.

In *Haverly* v. *Mercur* (1875) 78 Pa. 257, where it appeared that one having a subcontract to build a portion of a railroad for a company of which the defendant was the president, finding the contractor failing in payments and in doubtful circumstances, mentioned this to the defendant, who told him that he had better not quit, but that he could go on and that defendant would pay him, or see that he was paid, and that he should not lose a cent by it; that without abandoning his subcontract he continued to work under it, receiving pay-

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ments to a large amount under it from the contractor,—it was held that the evidence failed to show that the promise made by the defendant was an original promise.

In *Lewis* v. *Lewis Lumber Mfg. Co.* (1893) 156 Pa. 217, 27 Atl. 20, where an employee of a contractor said to an agent of the owners that he was afraid he would not be paid for his work, and the agent said to him, "Keep on to work just as you have been to work; we will see you paid;" and the employee kept on at work without giving notice to the contractor that he had ceased to work for him and entered the employment of the owner, and when the work was finished, did not go to the owner to settle, but to the contractor,—it was held that the promise in question was a collateral undertaking and within the statute.

In *Rancil* v. *Krohne* (1906) 31 Pa. Super. Ct. 130, where the owner of a building, fearing that men employed by the contractor would quit work, said to them: "I want to see you men stay with the job and complete it, and if you are afraid you will not get your money, I will see that you get your pay;" and the men went on working and receiving their pay from the contractor, it was held that the undertaking of the owner was not an original promise to pay for labor to be performed for his benefit, but a collateral undertaking to be liable for the debt and default of the contractor.

In *Stouffer* v. *Jackson* (1910) 42 Pa. Super. Ct. 450, where a materialman after delivering a portion of the goods, distrusting the credit of the contractor, told the owner about it, who told him, "I shall see that not one man loses a penny on anything that goes into my house," the materialman also testifying: "He said he would see I was paid, and I should make out the bill after I had the lumber in, and he would pay it, and I should get Mr. Norris [the contractor] to O. K. the bill,"—it was held that the testimony of the plaintiff was not so clear, precise, and indubitable as to warrant the court in permitting a jury to find that the owner was liable on a new and original undertaking to pay for the lumber in question.

A promise by a contractor to one supplying materials to a subcontractor that he would see that the money was paid, and take it out of the contract price, is merely one of suretyship. *Connor* v. *Stewart* (1913) 55 Pa. Super. Ct. 381.

In *Nichols* v. *Dixon* (1905) — Tex. Civ. App. —, 85 S. W. 1051, affirmed on other points in 99 Tex. 263, 89 S. W. 765, a promise to see a materialman paid for his material was held to be a promise to become liable for the debt of another.

c. Promise to pay out of money in promisor's hands.

See also in this connection, *Almond* v. *Hart* (1899) 46 App. Div. 431, 61 N. Y. Supp. 849; *Warnick* v. *Grosholz* (1858) 3 Grant, Cas.

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234; *Connor* v. *Stewart* (1913) 55 Pa. Super. Ct. 381, set out under II. b, *supra;* also *Kleinman* v. *Auerbach* (1913) 82 Misc. 436, 143 N. Y. Supp. 1033, set out under III. c, *infra.*

In *Andrews* v. *Smith* (1835) 2 Cromp. M. & R. 627, 1 Tyrw. & G. 173, 5 L. J. Exch. N. S. 80, it was held that a declaration stating that H. was employed to do work on certain houses, and that the defendant was employed as surveyor over him and to receive moneys to be paid to H. for such work; that in consideration that the plaintiff would provide and deliver to H. such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such moneys received by him as should become due to H. for the work, if H. should give him an order for that purpose; that H. gave the defendant such order, and that plaintiff provided the materials required,—set forth an original promise.

In *Dixon* v. *Hatfield* (1825) 2 Bing. 439, 10 J. B. Moore, 42, 3 L. J. C. P. 59, 27 Revised Rep. 686, where a contractor being unable to procure timber, it was supplied by a materialman on the owner's signing the following undertaking: "I agree to pay him [the materialman] for timber to house in Annett's Crescent out of the money that I have to pay W. [the contractor] provided W.'s work is completed,"—it was held that this was not a guaranty of payment by the contractor, but a direct undertaking to pay when the work should be completed.

In *Raabe* v. *Squier* (1895) 148 N. Y. 81, 42 N. E. 516, where materialmen refused to deliver further materials until paid for those already supplied, and the owners told them that they wanted the building finished, and that if the materialmen would go ahead and deliver the rest of the material they would see them paid therefor; that if the contractors did not pay, they would take it out of the amount going to them, and would pay the materialmen,—it was held that as the performance of the contract was beneficial to the promisors, the promise thus made was original and founded upon a new consideration.

In *Hiltz* v. *Scully* (1871) 1 Cin. Sup. Ct. Rep. 555, where a subcontractor, distrusting the credit of the contractors, before commencing work signified to the owner that he would not proceed with the work unless there were funds in his hands to secure him, the subcontractor, the payment of his compensation, and the owner then assured him that there were sufficient funds in his hands to pay for the work, and that it should be paid if he would only proceed, it was held that although the contractors were responsible for the work, yet under the circumstances the owner must also be considered as responsible as upon an original contract.

An agreement by the owner of a building to pay for materials

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supplied to a contractor, who was himself bound by the contract to furnish them, to the amount in his hands due to the contractor, though an agreement to answer for the debt or default of another within the statute of frauds, becomes an original promise, where the arrangement is recognized and ratified by the contractor. *Beitman* v. *Birmingham Paint & Glass Co.* (1914) 185 Ala. 313, 64 So. 600.

In *Ribock* v. *Canner* (1914) 218 Mass. 5, 105 N. E. 462, where one who had begun to do certain work in the construction of a building, upon which the defendant had taken a construction mortgage for an amount to be advanced to the builders in instalments as the work progressed, became suspicious of the financial responsibility of the builders, and refused to go on unless they would give him a written order upon the defendant to pay him for his work out of the advances to be made by the defendant on the mortgage, and the builders gave such an order, which the defendant refused to accept, but told the contractor "to go ahead with the job" and he would pay him the money; that the contractor should have "nothing to do with them builders," but that whenever he was "ready by his paper" to come up with a notice, then defendant would give him a check,—it was held that there was not, by any fair construction of the language used, a new and independent agreement that the contractor should go on and do the work upon the defendant's credit, but on the contrary the contract between the contractor and the builders remained in full force.

Where the owner, being informed that a materialman desires greater security than the credit of the contractor, and, being desirous that the materialman shall make prompt delivery of the materials, agrees that if the materialman will obtain an order on the contractor for the amount of his bill, he will accept and pay it,—the promise is one to answer for the debt of another and is within the statute. *Miles* v. *Driscoll* (1909) 201 Mass. 318, 87 N. E. 579.

d. Promise to pay if contractor does not.

A promise to pay a subcontractor if the contractor fails to do so is within the statute. *Smith* v. *Burditt* (1905) 107 App. Div. 628, 95 N. Y. Supp. 188; *Loftus* v. *Ivy* (1896) 14 Tex. Civ. App. 701, 37 S. W. 766.

An agreement by one who has contracted for the building of a house that he will become responsible for all the brick furnished, and will pay for them if the contractor does not, is within the statute. *Clay* v. *Walton* (1858) 9 Cal. 329.

A promise to an employee of a contractor, who had refused to work any more unless he knew where his pay was coming from, that if the employee would keep on with the work the owner would see it paid for, provided the contractor did not pay for it, is within the

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statute, the benefit or advantage accruing to the owner from having the employee continue the work not being so direct as to make the promise an original undertaking. *Morrissey* v. *Kinsey* (1884) 16 Neb. 17, 19 N. W. 454.

Where before beginning work under a subcontract, the subcontractor informed the owner thereof, and stated, that he should at once give notice to him that he intended to claim a lien for the services he should render and the materials that he should furnish, and should file a mechanic's lien therefor in due time; and the owner thereupon agreed that if the subcontractor would not give such notice, nor claim nor file any lien, he, the owner, would pay him the contract price on his performance of the subcontract for such work as he should do on the building, provided the same was not paid by the principal contractor, or so much thereof as the principal contractor did not pay, such promise is within the statute. *Warner* v. *Willoughby* (1891) 60 Conn. 468, 25 Am. St. Rep. 243, 22 Atl. 1014.

e. Miscellaneous.

See also in this connection, *Craft* v. *Kendrick* (1897) 39 Fla. 90, 21 So. 803; *Breen* v. *Isaacs* (1905) 49 Misc. 127, 96 N. Y. Supp. 741; *Sinkovitz* v. *Applebaum* (1907) 56 Misc. 527, 107 N. Y. Supp. 122; *Cooper & P. Structural Iron Works* v. *Rosing* (1914) 85 Misc. 409, 147 N. Y. Supp. 241; *Howell* v. *Harvey* (1909) 65 W. Va. 310, 22 L.R.A.(N.S.) 1077, 64 S. E. 249,—all of which are set forth under III. b, *infra;* and *Cox* v. *Halloran* (1902) 82 App. Div. 639, 81 N. Y. Supp. 803, set out under III. c, *infra.*

An agreement by the owner of the building to pay for brick which are furnished upon the credit of the contractor is within the statute. *O'Connell* v. *Mt. Holyoke College* (1899) 174 Mass. 511, 55 N. E. 460.

In *McRoberts* v. *Mathews* (1897) 18 App. Div. 624, 45 N. Y. Supp. 431, it was held that where materials were delivered to the contractor and charged on the books against him, a promise by the owner of the building in which they were to be used to pay therefor was not an original, but a collateral, undertaking.

An oral agreement by which the owner of the building promised payment to a subcontractor in event of the latter's completing his contract is void under the statute of frauds. *Snyder* v. *Monroe Eckstein Brewing Co.* (1905) 107 App. Div. 328, 95 N. Y. Supp. 144, affirmed without opinion in 188 N. Y. 576, 80 N. E. 1120.

In *McLaughlin* v. *Austin* (1895) 104 Mich. 489, 62 N. W. 719, where the contention of the plaintiff, a subcontractor, was that after he had done part of the work he was told by the owner, upon abandonment of the job by the contractor, to go ahead and finish the work and the owner would pay him, it was held that the filing of a state-

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ment of lien in which the subcontractor swore that the labor was done and materials were furnished in pursuance of the contract with the principal contractor, though evidence to be considered in determining whether the work was done in reliance upon a new undertaking with the owner, was not conclusive that it was not so done.

So, proof that the subcontractor made a claim against the contractor for the whole amount due him has been held not necessarily fatal to an attempt to hold the owner liable on an independent promise to pay for the work. *Desmond* v. *Schenck* (1899) 36 App. Div. 317, 55 N. Y. Supp. 251.

Where a subcontractor refuses to proceed with the performance of his contract unless he is paid, a promise on the part of the owner to pay him if he will do the work may be an original promise, if the subcontract is abandoned. *Wilhelm* v. *Voss* (1898) 118 Mich. 106, 76 N. W. 308.

In *Yeoman* v. *Mueller* (1888) 33 Mo. App. 343, evidence that after a subcontractor had entered upon his work the owner called on him and told him that he had already overpaid the contractor, and that for the additional work he would necessarily be obliged to pay himself, as it would be the subject of a lien upon the property, that he could get it done much cheaper than the price agreed upon between the subcontractor and the contractor, and that he therefore desired the subcontractor to discontinue the work; that thereupon the subcontractor refused to discontinue unless paid for what had already been done, and convinced the owner that he was mistaken in believing the price to be excessive, whereupon the owner told the subcontractor to go on and complete the work and send the bill to him and he would pay it,—was held to show an undertaking on the part of the owner to pay for the work independently of the previous contract, and that the work was completed upon the faith of this undertaking.

In *Schultz* v. *Cohen* (1895) 13 Misc. 638, 34 N. Y. Supp. 927, where a subcontractor who had partly performed his contract refused to proceed with the work because he had not been paid, and was told by the owner that he should go ahead and finish and he, the owner, would pay, it was held that the effect of this was to constitute an original undertaking on the owner's part to pay the subcontractor in accordance with the terms of the contract.

Where, after abandonment of the work by the principal contractor, the owner enters into a new arrangement with a subcontractor by which in consideration of his going on and completing his work the owner promises to pay him the whole value thereof, the promise is an original one. *Reisler* v. *Silbermintz* (1904) 99 App. Div. 131, 90 N. Y. Supp. 967.

In *Schild* v. *Monroe Eckstein Brewing Co.* (1905) 108 App. Div.

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50, 95 N. Y. Supp. 493, where a subcontractor before starting work went to the owner and told him in substance that he was afraid that he would not get his pay, and the owner said, "Go ahead and do the work and when it is through go ahead and get an order from [the principal contractor] and come up here and I will pay you," it was held that although the subcontractor did not in terms state that he would not go on with the work unless the owner undertook the payment, the fair inference from the conversation testified to was that the promise was exacted from him on condition of his performing the contract, and that the performance of the contract was the consideration which prompted the owner to make the promise, and therefore that the promise to pay was an original promise.

In *A. Schwoerer & Sons* v. *Stone* (1909) 130 App. Div. 796, 115 N. Y. Supp. 440, affirmed without opinion in 200 N. Y. 560, 93 N. E. 1116, it was held that a promise made by one who was largely interested in a corporation which was the principal contractor, and also in a corporation which was foreclosing a mortgage on the building, to a subcontractor who refused to begin work because of the financial difficulties of the principal contractor, that he would pay him for the work, was an original promise founded upon a new consideration beneficial to the promisor by reason of his interest before described.

In *Pool* v. *Sanford* (1880) 52 Tex. 621, it was said that if the testimony should show that the subcontractors were about to abandon the work because they were apprehensive that the principal contractor would not pay them, or for other good and sufficient reason, and that to prevent this they were induced by the owner to continue and complete their part of the work in consideration that he would pay them therefor, this would be a sufficient original undertaking to take the contract out of the statute of frauds, and to bind the owner.

In *Imperial Roofing Co.* v. *Dick* (1913) — Alberta, —, 10 D. L. R. 484, 23 West. L. Rep. (Can.) 821, it appeared that before anything had been done under a subcontract, the principal contractor died; that a verbal arrangement was thereupon made between the subcontractor and the owner whereby the subcontractor went on and did the work on the strength of the owner's promise to pay for it; that the subcontract with the principal contractor was not formally put an end to in any way, but that no communication of any kind took place with reference to it between the subcontractor and anyone representing the estate of the principal contractor,—it was held that as the subcontractor had treated the original contractor as being released, the contract with the owner, although based upon the subcontract so far as the work to be done and the price to be paid were

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concerned, was independent of it with respect to the liability of the contracting parties.

Where the owner of a building in process of construction, upon being informed by the employee of a subcontractor that he was afraid he would not be paid, and that he therefore intended to abandon the work, said: "Go ahead and finish the work and I will pay you. Never mind about Scully [the subcontractor],"—the promise of the owner is an original undertaking. *Mannetti* v. *Doege* (1900) 48 App. Div. 567, 62 N. Y. Supp. 918.

An agreement to pay the entire bill of a materialman if he will go on and furnish material for the completion of the building is, so far as material thereafter furnished is concerned, an original undertaking. *Fitzgerald Spear Co.* v. *Kelly* (1911) 81 N. J. L. 6, 83 Atl. 491, affirmed without opinion in 83 N. J. L. 626, 85 Atl. 1134.

In *Potter* v. *Greenberg* (1904) 24 Pa. Super. Ct. 505, where it appeared that persons having a contract for the furnishing of material and plastering a number of buildings requested the plaintiff to furnish them the materials necessary for their work; that the plaintiff was not willing to furnish this material on their credit, and that an interview took place between the owner, the plastering contractors, and the plaintiff, which resulted in the contractors drawing an order on the owner in favor of the plaintiff for the payment of a certain sum of money sixty days after the completion of the plastering, which order was accepted by the owner in writing; and that the plaintiff thereafter sold and delivered the materials,—it was held that though the owner had originally agreed to pay the plastering contractor for both labor and materials, the engagement above described was in relief of such agreement, and made with the consent of all the parties interested, and was therefore an agreement to pay his own debt; that the order in question was collateral security, and could not be used to defeat the right of the plaintiff to recover from the owner the actual value of the material sold and delivered.

III. Promises relating to indebtedness of contractor then existing.

a. In general.

Although there is much conflict as to the principles or rules which should apply as a test to determine whether a promise is original or collateral, as well as to their application to a case where the liability of the original debtor is not extinguished as a part of the consideration of the promise in suit, the weight of authority is to the effect that a promise to pay the pre-existing debt of another may be original rather than collateral, and hence not within the statute of frauds, although the original debtor is not released. In order, however, that such a promise be removed from the operation of the stat-

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ute of frauds, it must be an original promise to pay out of the money of the debtor then in the promisor's hands, or thereafter to be placed in his custody, or it must be an independent agreement with the creditor based upon some substantial consideration or benefit inuring to the promisor, the securing of which is the primary purpose of the promise, the payment of the debt being merely secondary or incidental. See notes in 22 L.R.A.(N.S.) 1077, and 40 L.R.A. (N.S.) 242.

Thus in *Hall* v. *Alford* (1899) 105 Ky. 664, 49 S. W. 444, it is held that if any direct benefit is to be obtained to the promisor, he must be understood to intend an undertaking which is not within the statute, although its performance may have the effect of discharging the debt of another.

And in *Birchell* v. *Neaster* (1881) 36 Ohio St. 331, it is held that the continuation of the liability of the original debtor, while a very important factor in determining the nature of the new promise, is not controlling; but the test is, Was the promise one to answer for the debt, default, or miscarriage of another, or was it an agreement to make the old debt the debt of the promisor?

If the intention of the courts which hold that an agreement to pay the existing debt of another is not an original promise where the liability of the original debtor is not extinguished is simply to hold that, in the absence of some new and independent consideration, such as the release of the original debtor, the promise cannot be regarded as an original rather than as a collateral undertaking, their position is a proper one.

b. Promise to pay if promisee will continue performance.

See also in this connection *Rand* v. *Mather* (1853) 11 Cush. 1, 59 Am. Dec. 131; *Bresler* v. *Pendell* (1864) 12 Mich. 224; *Brown* v. *Weber* (1868) 38 N. Y. 187; *Desmond* v. *Schenck* (1899) 36 App. Div. 317, 55 N. Y. Supp. 251; *Warnick* v. *Grosholz* (1858) 3 Grant, Cas. 234; *Stouffer* v. *Jackson* (1910) 42 Pa. Super. Ct. 450, set forth in II. b, *supra; Raabe* v. *Squier* (1895) 148 N. Y. 81, 42 N. E. 516, set forth in II. c, *supra; Schultz* v. *Cohen* (1895) 13 Misc. 638, 34 N. Y. Supp. 927; *Mannetti* v. *Doege* (1900) 48 App. Div. 567, 62 N. Y. Supp. 918; *Reisler* v. *Silbermintz* (1904) 99 App. Div. 131, 90 N. Y. Supp. 967; *Snyder* v. *Monroe Eckstein Brewing Co.* (1905) 107 App. Div. 328, 95 N. Y. Supp. 144, affirmed without opinion in 188 N. Y. 576, 80 N. E. 1120; *Fitzgerald Spear Co.* v. *Kelly* (1911) 81 N. J. L. 6, 83 Atl. 491, affirmed on opinion of court below in 83 N. J. L. 626, 85 Atl. 1134; *Pool* v. *Sanford* (1880) 52 Tex. 621, set forth in II. e, *supra.*

In *Sinclair* v. *Richardson* (1840) 12 Vt. 33, where it appeared that a subcontractor, when about to complete his work, said to the

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owner of the premises, "I want you to agree to pay me for the building of the house or I can do no more to it," and that the owner said in reply, "Do you go on and finish the house and I will pay you for it, or see you paid," and that thereupon the subcontractor went on and completed the work, his original contract remaining unrescinded, it was held that whether the new contract was auxiliary or independent was a question of fact; that if the terms used on such an occasion clearly imply that the former contract is to continue and the new one be auxiliary thereto, then it was matter of law that the new contract must be in writing, but that if, as in the present case, the terms are uncertain, equivocal, or ambiguous, then it must always be left to the jury to find whether in fact the former contract was to continue, or whether the whole was abandoned and the new contract and credit substituted in its place.

In *Anderson* v. *Davis* (1837) 9 Vt. 136, 31 Am. Dec. 612, where it appeared that the owner contracted with one L. to erect a certain building, that afterwards L. employed the plaintiff to work with him on the building for a time, when L. was taken sick and the work ceased; that the plaintiff then called on the owner, who promised to pay him for the work by him already done, and the days' work he should afterwards do,—it was held that if the owner became holden to the plaintiff for his claim against L. as collateral to L., and the claim still remained against L., it was within the statute, but if he was to assume the debt and be alone holden, and L. discharged, then the contract was not collateral, but independent, and not within the statute.

Where a subcontractor threatened to abandon work because of nonpayment for work done, the oral promise of the owner to pay him if he will go ahead and complete the work is not within the statute. *Craft* v. *Kendrick* (1897) 39 Fla. 90, 21 So. 803; *Sinkovitz* v. *Applebaum* (1907) 56 Misc. 527, 107 N. Y. Supp. 122; *Cooper & P. Structural Iron Works* v. *Rosing* (1914) 85 Misc. 409, 147 N. Y. Supp. 241; *Howell* v. *Harvey* (1909) 65 W. Va. 310, 22 L.R.A. (N.S.) 1077, 64 S. E. 249. Such a promise is original, although its effect is to release or suspend the debt of another, the main purpose and object of the promisor being to subserve a purpose of his own. *Clifford* v. *Luhring* (1873) 69 Ill. 401.

If, in order to secure the continuance of the work by a subcontractor after an abandonment of the job by the principal contractor, the owner of the property undertakes to pay the subcontractor not only the amount which shall become due for future work, but also the amount already due him from the contract or for work performed under his contract with them, such an agreement is not an agreement to pay the debt of another, but is an agreement by which the owner relieves himself from liability to the principal contractor, and secures

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the advantage of the completion of the work. *Jones* v. *General Constr. Co.* (1911) 150 Iowa, 194, 129 N. W. 830.

Evidence that about the time a subcontractor commenced work he asked the owner about his pay, that the owner said it "would be all right; to go about the work," without, however, promising to pay for it; that later he notified the owner that the contractor was getting behind with him in his pay, and wanted to know if he was safe for his money, that if the owner would not see that he got his money he would quit work and take other proceedings about it; that the owner told him not to get scared but to go ahead with the work; and that he would see that all subcontractors were paid; and that relying upon this promise he went on and completed his job,—was held to show that the owner induced the subcontractor to go on with the work by his promise to pay therefor, and that these promises were made for his own benefit and were not within the statute. *Hall* v. *Alford* (1899) 105 Ky. 664, 49 S. W. 444.

In *Breen* v. *Isaacs* (1905) 49 Misc. 127, 96 N. Y. 741, where it appeared that the purchaser of property under construction said to a subcontractor, in effect, that if he would put on more men and hasten the job to completion, she would pay him all that was then due him under the contract and what might thereafter become due, and there was evidence that the promisor desired the buildings to be finished as promptly as possible in order that they might become rentable,—it was held that as the purchaser incurred an independent duty of payment irrespective of the liability of the principal debtor, her promise to pay was not void under the statute.

In *Conrad* v. *Kaplan* (1914) 24 Manitoba L. Rep. 368, 18 D. L. R. 37, 28 West. L. Rep. (Can.) 464, 6 W. W. R. 1061, where it appeared that a subcontractor after doing a part of his work was given an order on the owner for the amount due him, that the subcontractor told the owner that he would not work any further unless paid that sum, and that the owner then told him that if he would go on and finish the work he was doing, he, the owner, would pay the amount, it was held that as the object of the promisor was not the payment of the debt, but the completion of the work, the promise was an original one, though the contractor was not thereby released from his indebtedness to the subcontractor.

In *Beard* v. *Hack* (1899) 13 Pa. Super. Ct. 390, it was held that a promise made by the owner of land to the plaintiff, who was employed by the purchaser of timber thereon to haul the timber to mill, upon the purchaser's failure in business, to pay the plaintiff the amount due as an inducement to him to continue at work, was not within the statute.

In *Fitzgerald* v. *Morrissey* (1883) 14 Neb. 198, 15 N. W. 233, where a contractor promised the employees of a subcontractor that

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if they would not abandon work, but would enter into his employment, he would pay them for work previously performed for the subcontractor, it was held that the promise was an original one.

An oral promise by a surety for a principal contractor, who has abandoned his contract, to assume the payment of the amount due a subcontractor if he will continue to perform his subcontract, is not an agreement to answer for the debt of another, but an independent agreement founded on good consideration. *Roy & Titcomb* v. *Flin* (1906) 10 Ariz. 80, 85 Pac. 725.

Where the original contractor defaulted, and his surety, desiring to take up the work and finish it, told a subcontractor, "If you will go on with this work, I will pay you what is coming to you for what you have already done, and I will pay you 50 cents a perch for what you do for me for the balance of the work,"—it was held that though standing by itself this promise would be unenforceable under the statute of frauds, the promisor, occupying the position he did, must be taken to have made the original debt his own. *Pizzi* v. *Nardello* (1904) 209 Pa. 1, 57 Atl. 1100.

A promise by one who has undertaken to advance money to the owners upon a building loan, to pay a materialman who has refused to furnish any more material unless paid, is not within the statute, notwithstanding the subsisting liability of the original debtors. *Boeff* v. *Rosenthal* (1902) 38 Misc. 760, 78 N. Y. Supp. 1108, affirming 37 Misc. 852, 76 N. Y. Supp. 988.

On the other hand, in *Lachman* v. *Irish* (1893) 72 Hun, 491, 25 N. Y. Supp. 193, where one who had purchased some incomplete houses told some employees of the owner, who had refused to work any more until paid for what they had done, "You go ahead and do what is right and I will see you through,"—it was held that as the evidence failed to show that the promisor had assumed the payment for the work which had been performed upon any consideration moving to him which made the amount of such liability his debt, the promise was, as to the work already done, within the statute.

A promise by the owner of a vessel under construction, for which timber had been furnished to the contractor, that if the seller would furnish what further timber should be required to finish the vessel, he, the owner, would pay for it on the seller getting an order from the contractor, is an agreement to answer for the debt of another, so far as it relates to timber previously furnished. *Rounds* v. *May* (1874) 35 U. C. Q. B. 367.

c. Promise to pay if promisee will refrain from filing lien.

Where a person has a lien on property for the payment of his debt, and he abandons such lien to a person who has an interest in the property upon the promise of such person to pay his debt, the promise

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is not within the statute of frauds, and the person making the promise is liable therefor. *Luark* v. *Malone* (1870) 34 Ind. 444.

So, in *Burr* v. *Mazer* (1896) 2 Pa. Super. Ct. 436, it was held that a trustee of a church, by saying to a subcontractor, who was threatening to put a lien upon the church to secure his pay for work thereon, "For God's sake, don't shame me and our church. I will pay you if you don't lien,"—rendered himself liable for the amount due such subcontractor, the interest of the promisor being deemed sufficient (he having had charge of the building operations of the church) to make his promise an original one.

And in *Cox* v. *Halloran* (1902) 82 App. Div. 639, 81 N. Y. Supp. 803 (appeal dismissed 179 N. Y. 533, 71 N. E. 1129) it was held that where the owner told a materialman, who was threatening to remove from the premises such lumber as had not been used, and to file a lien for the balance, that if he would not do so, but would continue to deliver lumber, he would pay his bill and be responsible for all additional lumber, the promise was an original one.

Again, in *Kleinman* v. *Auerbach* (1913) 82 Misc. 436, 143 N. Y. Supp. 1033, where one having an agreement with the owner of a building to do construction work declined to go on when certain payments became in arrears, and thereupon a mortgagee promised that if he would resume the work and complete it, and abstain from filing a mechanics' lien, he would pay plaintiff the money due, at the same time saying that he had enough money on hand out of the new building loan to pay the amount which he promised,—it was held that the promise was an original one.

d. Promise to pay out of money in promisor's hands belonging to debtor.

In *Collier Bridge Co.* v. *Lippert* (1910) 32 Ohio C. C. 651, it was held that a promise by a principal contractor to pay the time checks issued to the laborers employed by a subcontractor must be interpreted only as a promise to pay such checks in the event there is something due to the subcontractor, and that it is, therefore, not within the statute of frauds.

A promise by the owner, with the consent of the contractor, that if laborers employed by the latter will continue to labor he will pay their wages for the past as well as for the future, provided the funds in his hands belonging to the contractor should be sufficient, is not within the statute of frauds. *McKeenan* v. *Thissel* (1851) 33 Me. 368.

But in *Griffin* v. *Cunningham* (1903) 183 Mass. 505, 67 N. E. 660, it is held that a promise on the part of the owner to pay a materialman out of any balance due to the contractor that might remain after a settlement of liens for labor is a collateral undertak-

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ing, the original debt owed by the contractor to the materialman not being extinguished. As above pointed out, the foregoing case, in making the extinguishment of the contractor's liability a controlling test, is opposed to the weight of authority.

An agreement whereby the contractor agrees that the balance coming to him shall be paid to a materialman, and whereby the owner assents to the substitution and promises to pay the materialman the balance remaining due under the contract after the settlement of any liens for labor, in consequence of which the materialman releases the contractor and looks to the owner solely for the payment of his bill, operates as a novation, and is not within the statute. *Ibid.*

E. S. O.

[ENGLISH DIVISIONAL COURT.]

HADWELL v. RIGHTON.

[1907] 2 K. B. 345.

Also Reported in 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.

Trespass — Damages — Remoteness — Fowls straying on highway — Damage to passenger — Liability of owner.

The plaintiff was riding a bicycle on a highway upon the footpath of which were some fowls belonging to the defendant. As the plaintiff got abreast of the fowls a dog belonging to a third person frightened the fowls, one of which flew into the spokes of the machine, causing it to upset, whereby the plaintiff suffered personal injury and the bicycle was damaged:—

Held that, even if the fowl was not lawfully on the highway the circumstances under which the accident happened prevented the damage from being the natural consequence of its presence there, and that the plaintiff could not recover.

Quære whether the occupiers of land adjoining a highway are not entitled to allow their poultry to stray about the highway?

(May 14, 1907.)

Appeal from the Birmingham County Court.

The plaintiff was riding a bicycle at the rate of about 6 miles an hour down a highway called Bordesley Park road, when he saw in front of him on the footpath three fowls. When he got abreast of the fowls all three suddenly fluttered up, and

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one of them flew into the spokes of his bicycle and he was upset, with the result that he suffered personal injuries and his bicycle was damaged. The fowls were the property of the defendant, who occupied premises on the side of the road opposite to the footpath on which the fowls were immediately before the accident. The cause of the fowls starting to fly across the road was that they were frightened by a dog which came out of premises adjoining those of the defendant on which the fowls were kept, and either ran at or barked at them. The plaintiff was riding carefully, and the accident happened through no fault of his. The defendant knew that the fowls were in the habit of straying out into the road. The county court judge held that the damage was too remote a consequence of their being allowed to stray there, and gave judgment for the defendant. The plaintiff appealed.

Avory, K.C., and **Simey**, for the plaintiff. The owner of an animal is liable for its trespasses. He keeps it at his peril, and if it escapes from his premises he is responsible for any damage [**346**] that naturally results from its escape. Here the fowl, by escaping on to the highway, naturally caused an obstruction of the way. Its presence on the road was a nuisance, and the damage done was the direct consequence of that nuisance. It was not the less direct because it could not be antecedently contemplated as the probable result of allowing the fowls to stray. The case of *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 430, 32 L. J. C. P. N. S. 89, 9 Jur. N. S. 970, 11 Week. Rep. 435, where it was held that the owner of a horse which strayed on a highway and then kicked a child was not liable in the absence of notice that the animal was accustomed to kick mankind, is distinguishable. For there the damage was not the natural result of the horse's presence in the road, but was the result of an act done by the horse contrary to its known disposition. Here the damage is the result, not of an act done by the fowl, but of its very presence on the road without more. What is complained of is that it caused an obstruction to the right of passage. The case is the same as if some inanimate object had been carelessly left lying in the middle of the road and the plaintiff had ridden against it in the dusk. The case of *Lee* v.

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Riley (1865) 18 C. B. N. S. 722, 34 L. J. C. P. N. S. 212, 11 Jur. N. S. 822, 12 L. T. N. S. 388, 13 Week. Rep. 51, supports the plaintiff's contention. There the defendant's mare strayed into a field of the plaintiff in which was a horse. From some unexplained cause the animals quarreled, and the defendant's mare kicked the plaintiff's horse and damaged it. It was held that the damage was not too remote. And the case of *Ellis* v. *Loftus Iron Co.* (1874) L. R. 10 C. P. 10, 44 L. J. C. P. N. S. 24, 31 L. T. N. S. 483, 23 Week. Rep. 246, where the facts were very similar, was decided in the same way.

[**Bray, J.**: But in those two cases the plaintiff was the owner of the land on which the animal was trespassing. Is there any case in which an action has been held to lie for similar damage done upon a highway at the suit of a person who was not the owner of the soil?]

That the plaintiff here is not the owner of the soil of the highway, so that the presence of the fowl upon it was not a trespass as towards him, is not material. It was wrongful towards him as interfering with his right of passage, and, as he has suffered a special damage, an action lies. "If there be an act done upon any part of the highway which is not a part of [**347**] the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage." Per Denman, J., *Harris* v. *Mobbs* (1878) 3 Ex. D. 268, at p. 271, 39 L. T. N. S. 164, 27 Week. Rep. 154. It was an unlawful use of the highway to allow the fowls to stray about it, just as much as to allow of its obstruction by horses. "The King's highway," said Lord Ellenborough in *Rex* v. *Cross* (1812) 3 Campb. 224, 13 Revised Rep. 794, "is not to be used as a stable yard," neither is it lawful to use it as a poultry run.

[**Bray, J.**, referred to the case of *Milns* v. *Garratt*, Times, March 6, 1906, where a blind dog in a public street ran into, or was run into by, a cyclist, who was thereby upset and injured, and it was held by the Divisional Court that no action lay against the owner of the dog.]

That case, which is not reported elsewhere, may possibly be

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explained upon the ground that dogs seem to stand upon a peculiar footing. They are accorded a special privilege according to the old authorities, because they are not the subjects of larceny at common law. Per Holt, C.J., *Mason* v. *Keeling* (1700) 1 Ld. Raym. 606.

McCardie, for the defendant, was not called upon.

Phillimore, J.: I propose to rest my decision in this case upon *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 430, 436. The passage in that case to which I would specially refer is in the judgment of Erle, C.J.: "To entitle the plaintiff to maintain the action it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. . . . But even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner [348] knows it." In the present case the county court judge assumed that the fowls were unlawfully upon the highway as they were not using it for the mere purpose of passage either in the company of their owner or without him. Even if we adopt that assumption, was the damage which in fact happened of such a nature as was likely to result from their unlawful presence there? There was no antecedent probability that the fowl would be frightened by a dog, still less was there any probability that if so frightened it would fly into the spokes of a bicycle. The owner was not bound to contemplate such a result as likely to flow from his letting the fowls be at large upon the road. Even if the fowl was wrongly upon the highway it would have done no harm but for the wrongful act of the animal of a third person. In the course of endeavoring to avoid one danger it runs into

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another. And in such a case, *Causa proxima non remota spectatur*. The negligence, if any, of allowing the fowl to be there was not connected with the damage. Apart from the action of the dog there was no evidence that fowls are in the habit of flying into passing bicycles.

So far I have assumed that the county court judge was right in treating the fowl as wrongfully upon the highway, but I cannot allow the case to pass without saying that I think the plaintiff's counsel have put too narrow a limitation upon the uses to which a highway may lawfully be put. It was said that the rights of members of the public in a highway were confined to passing and repassing, and that animals, except when accompanied by their owners, had no right to be on the highway at all. In the first place, I think that members of the public, in addition to using it *eundo et redeundo*, are also entitled to use it *morando* for a short time. And I doubt whether, even with that addition, the lawful uses are thereby exhausted. For instance, if fowls are kept near a highway, and there is a corn stubble belonging to their owner on the other side of the road to which they might naturally and properly go, I am not prepared to say that to allow them to go there by themselves would be an unlawful use of the highway by their owner simply because they might while so doing run or fly into someone who was riding a bicycle. The appeal must be dismissed.

[349] **Bray, J.:** I am of the same opinion. We cannot decide this case in the plaintiff's favor without overruling *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 430, 39 L. J. C. P. N. S. 89, 9 Jur. N. S. 970, 11 Week. Rep. 435. We have no power to overrule it, nor should I be inclined to exercise that power if we could. It is said that the fowl was trespassing. But the cases which were relied upon as showing that that would give a cause of action were cases in which the plaintiff was the owner of the soil on which the trespass was committed, and are consequently not in point, for here the cyclist had no interest in the soil of the highway. The plaintiff's case could only be rested on the ground of negligence, as in the case of *Harris* v. *Mobbs* (1878) 3 Ex. D. 268, where the defendant left a house van on the grassy side of a highway for the night, and a horse, being driven along the

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road, was frightened by it and bolted. Denman, J., there held the defendant responsible for the consequences, but he did so upon the ground that the jury had in effect found "that there was an unreasonable and dangerous occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which was unreasonable." Where is there anything dangerous in letting fowls stray on a highway? The business of farming could not be conveniently carried on if such an act were not permissible. Homesteads are usually near a road, and it is practically impossible to keep fowls in. I should not hesitate to find that there was no danger at all in allowing them so to stray. Such an accident as this I have never heard of before. And, in the absence of anticipated danger, there is no room for the suggestion of negligence.

Appeal dismissed.

Solicitors for plaintiff: *Tiddeman & Enthoven, for Grey & Cox, Birmingham.*

Solicitors for defendant: *Judge & Priestley, for Philip Baker & Co., Birmingham.*

Note.—Liability of owner of animal allowed to stray or run at large on highway or other public place for injuries to persons or property of passers-by occasioned otherwise than by direct attack.

In order that a person injured by reason of the presence of an animal at large upon the highway may succeed in an action against its owner, he must establish that the injury of which he complains was the result of some breach of duty towards him on the part of the owner.

This duty may be one existing at common law, or one imposed by statute. In order to establish a breach of the duty of restraint which the common law imposes upon the owner of an animal, it must appear that the accident was an ordinary result of the animal's natural or known propensities or individual characteristics. To this end it may be necessary to show scienter, *i. e.*, that the owner knew, or, in the exercise of due care should have known, the animal's dangerous characteristics. So, if the duty imposed by statute is a qualified one, it must likewise appear that the injury complained of was proximately caused by the breach of the particular duty imposed.

If, on the other hand, the duty imposed either at common law or

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by statute is an absolute one, proof of scienter becomes unnecessary, and it would seem that the owner should be liable for all injuries resulting in consequence of animals being at large, irrespective of the question whether they were such as might reasonably be anticipated.

The fact that in permitting an animal to escape or run at large on the highway the owner may have been guilty of a breach of duty in respect to such injuries as may reasonably be anticipated does not render him liable in respect of injuries which were not reasonably to be anticipated.

To say that the act of the owner of an animal in allowing it to stray upon a highway is not the proximate cause of an injury occasioned by its presence thereon is only another way of saying that, so far as the plaintiff is concerned, there was no negligence on the part of the owner. This note accordingly includes cases in which the decision takes the form of a statement that the act of the owner in suffering the animal to be at large was not the proximate cause of the injury, as well as those in which it takes the form of a statement that he was or was not negligent.

A view apparently at variance with that taken by the court in HADWELL v. RIGHTON, but perhaps reconcilable therewith, is expressed in Shearman & Redfield on Negligence, 6th ed. vol. 1, § 39a, as follows: "The acts of animals, consequent on defendant's negligence, and intervening between such negligence and the infliction of injury, though standing alone as an adequate cause and one without which the injury would not have happened, will not relieve him from liability. The instinctive action of animals in such cases is analogous to the operation of the laws of matter. It has been thought by some that when the action of animals is so unusual and extraordinary that it could not reasonably have been anticipated, the negligent defendant should not be held liable for such consequences as would not otherwise have occurred. But the weight of reason and authority is the other way, *viz.*, because the action of brute animals under given conditions, as of freight or anger, is incapable of being foreseen, a negligent defendant, who has either incited them or given an opportunity for their exercise, will be liable for their cooperative consequences whatever they are, whether ordinary and anticipated or extraordinary and unforeseen."

It is suggested that the foregoing statement is perhaps reconcilable with HADWELL v. RIGHTON on the ground that it starts with the assumption that the defendant's act or omission constituted negligence with respect to the person injured, and simply means that, having frightened or enraged an animal under circumstances which would render the defendant liable for injuries resulting therefrom in the usual course of things, he is not relieved from liability because of some extraordinary turn of events. This is in no way at variance

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with the view that where the original act of the defendant was not a breach of duty towards the plaintiff, he is not liable for unforeseen consequences of his act, although they result in injury.

In Malony v. *Bishop* (1905) — Iowa, —, 2 L.R.A.(N.S.) 1188, 105 N. W. 407, 19 Am. Neg. Rep. 230, it is held that one who directed his servant to capture a chicken which had escaped from confinement and entered a public park was not liable for the breaking of a neighboring window caused by the chicken's flying against it in its endeavors to elude its pursuer, on the ground that such a result could not reasonably have been anticipated.

In *Zumstein* v. *Shrumm* (1895) 22 Ont. App. Rep. 263, it was held that in the absence of any evidence from which negligence on the defendant's part could be proved or presumed, or any knowledge possessed by him of the possibility of his turkey cock acting so as to frighten horses, he was not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkey cocks usually do.

In *Higgins* v. *Searle* (1909) 100 L. T. 280, 25 T. L. R. 301, where a sow, which had escaped from her stye, lay on the roadside and, as the driver of a motor car sounded his horn, rose suddenly from the side of the hedge just as a horse and van which were proceeding along the highway were about to pass the motor car, thereby frightening the horse, which shied across the highway in front of the motor car, so that the driver of the car, in endeavoring to avoid the horse and van, ran into a stone wall, it was held that the owner of the sow in permitting her to stray upon the highway was guilty of no such breach of duty to travelers thereon as would render him liable for damages to the motor car.

In *Shipley* v. *Colclough* (1890) 81 Mich. 624, 21 Am. St. Rep. 526, 45 N. W. 1106, one unlawfully permitting cattle to run at large in the highway was held liable where one cow hooked and pushed another against and down and under the wheel of a sulky which was being driven along the road, and the cow in rising up overturned and broke the sulky.

The negligence of a railway company resulting in a train wreck is the proximate cause of an injury inflicted by an unruly Texas cow, which, having escaped from the wreck and while being driven to the stock yards, ran across a sidewalk and knocked the plaintiff down. *Hartman* v. *Atchison, T. & S. F. R. Co.* (1915) 94 Kan. 184, L.R.A. 1915D, 563, 146 Pac. 335, 8 N. C. C. A. 445.

One who unlawfully permits cows to run at large on a public highway is, as a matter of law, not guilty of such negligence as will make him liable in damages on account of a horse taking fright at the cows, where it is not averred that the owner of the cows did anything more than to permit them to run at large on the public

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highway, or that it was in the nighttime when the accident occurred, and the cows had so obstructed the beaten part of the highway that a horse of ordinary gentleness might take fright thereat. *Anderson* v. *Nesbitt* (1909) 43 Ind. App. 703, 88 N. E. 523.

There being no common-law duty in Ohio to prevent animals from straying at large upon the highway, the owner of a cow at large in the public highway is not, in the absence of anything to show that he might reasonably have apprehended that the safety of travelers would thereby be in danger, liable in damages to a person injured by being thrown from her vehicle through her horse taking fright at the cow getting up when she attempted to drive around it. *Marsh* v. *Koons* (1908) 78 Ohio St. 68, 16 L.R.A.(N.S.) 647, 125 Am. St. Rep. 688, 84 N. E. 599, 14 Ann. Cas. 621.

Under article 1055 of the Quebec Civil Code, by the terms of which the owner of an animal which has strayed or escaped is responsible for the damage which the animal has caused, there is a presumption of fault against the owner of an animal which has occasioned damage, from which he can relieve himself only by showing that the accident has some other cause, such as the fault of the victim, or *force majeure*. Accordingly, in the absence of such proof, the owner of a wandering calf whose sudden appearance upon the road frightens a horse, causing him to kick and upset the carriage to which he is attached, is responsible for the damage thereby occasioned. *Charette* v. *Huneault* (1910) Rap. Jud. Quebec 39 C. S. 88.

In *Jones* v. *Lee* (1911) 106 L. T. N. S. 123, 76 J. P. 137, *post*, 127, 28 Times L. R. 92, 56 Sol. Jo. 125, where it appeared that a young horse placed by the defendant in a field adjoining a highway escaped through a gap in the fence of which the defendant knew, or ought to have known, onto the highway; that the plaintiffs were riding a tandem bicycle along the highway, when the horse turned around suddenly and ran across the road, coming in contact with the bicycle; that the horse fell down, and then, jumping up, lashed out and injured one of the plaintiffs and damaged the bicycle,—it was held that the injury was not a natural consequence of the owner's negligence in putting the horse in a field defectively inclosed.

In *Patterson* v. *Fanning* (1901) 2 Ont. L. Rep. 462, it was held that the injury suffered by the plaintiff in being knocked down by a horse which, having strayed from his field to the highway, was frightened by a boy and ran upon the sidewalk, was just such as might naturally and reasonably be expected to be caused by horses running along the street uncontrolled.

The act of the driver in leaving his team unsecured in a public street, and not the unusual noise which frightened them and caused them to run away, was the proximate cause of the injury to one with

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whose buggy they collided. *Hull* v. *Thomson Transfer Co.* (1909) 135 Mo. App. 119, 115 S. W. 1054.

The act of a boy in snapping a toy pistol causing horses which had been left standing in a street tied, but not "properly secured" as required by a city ordinance, to break the strap by which they were tied and run away, has been held not to be such an intervening cause of the accident as will relieve the owner of the horses from liability. *Parkin* v. *Grayson-Owen Co.* (1914) 25 Cal. App. 269, 143 Pac. 257, 6 N. C. C. A. 1043.

In *Kitchens* v. *Elliott* (1896) 114 Ala. 290, 21 So. 965, where a horse, unlawfully at large on a public street, in violation of a city ordinance, by chasing a colt away from its mother caused the mother to run away, resulting in the breaking of the wagon and the injury of the mare, it was held that the damage was the natural, probable, and proximate result of the breach of the ordinance.

In *Holden* v. *Shattuck* (1861) 34 Vt. 336, 80 Am. Dec. 684, where plaintiff gave evidence to the effect that while passing along the highway he saw the defendant's horse upon the roadside; that as he came opposite, it suddenly turned and reared and came at the plaintiff's horse as if about to jump onto him, and made demonstrations as though to bite and kick the plaintiff's horse, and then turned and came into the highway near to and ahead of the plaintiff's horse and trotted ahead for some 10 or 12 rods and then commenced running; that the plaintiff's horse endeavored to keep up and broke into a run, but the plaintiff restrained it after running 5 or 6 rods; that 65 rods from where the defendant's horse first turned upon the horse of the plaintiff defendant's horse turned off the highway onto a cross road, and after passing about 12 rods stopped; that the plaintiff's horse wanted to follow, and attempted to do so, but the plaintiff succeeded in driving along the highway without difficulty, but that his horse after passing the cross road was excited and inclined to go faster, and frequently turned its head and looked back, and that at arriving at a small sluiceway in the road 202 rods from where the defendant's horse turned off it suddenly flung its head around, sprang forward, kicked and broke the shafts of the wagon, and ran, cutting its legs and damaging the harness and wagon; that his horse was three years old, well broken, and had no unsteady or bad tricks; and that the defendant's horse was in the highway with his knowledge and consent, and was high spirited and accustomed to bite and quarrel with other horses,—it was held that in order to constitute the being there of such an animal wrongful on the part of the owner, it should appear that the circumstances and occasion, or that the character and habits of the animal, were such as to show carelessness on the part of such owner

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in reference to the convenience and safety of travelers on such highway.

Where a statute imposes a positive duty upon owners of horses to keep them from running at large in the highway, a breach of duty constitutes negligence which entitles one to whom the duty is owing and who has been injured by the breach to recover; and the owner is accordingly liable for the acts of his horses in the highway without proof of knowledge on his part of their propensity so to act. *Bowyer* v. *Burlew* (1874) 3 Thomp. & C. 362.

In *Jones* v. *Owen* (1874) 24 L. T. N. S. 587, where the plaintiff was injured while walking on the highway by being thrown down by a piece of rope coupling two greyhounds, one of whom passed by on each side of him, it was held that the arbitrator was warranted in finding that the owner was guilty of negligence in allowing his greyhounds to run on the highway so coupled together.

The fact that it is unlawful to permit a dog to run at large without a muzzle does not render the owner of a dog so running at large liable for injuries to a pedestrian whom the dog trips and injures, the absence of the muzzle not being the proximate cause of the injury. *Forsythe* v. *Kluckhohn* (1911) 150 Iowa, 126, 33 L.R.A.(N.S.) 163, 129 N. W. 739.

"It is common knowledge," said the court in *McClain* v. *Lewiston Interstate Fair & Racing Asso.* (1909) 17 Idaho, 63, 25 L.R.A. (N.S.) 691, 104 Pac. 1015, 20 Ann. Cas. 60, "that a speed contest between horses is for the entertainment and edification of the human family, and not the dog family, and that as a rule large numbers of people gather near the race track, and at which place there is excitement, jostle, and push in the struggle for an advantageous position, where the spectator may best observe the contest. At such place we think a dog should not be permitted to go, and especially should not be taken, and that a person who takes, or suffers a dog to be taken, to such place, where an injury results from the acts of the dog, is guilty of negligence." It was accordingly held that the owner of a dog was liable for injuries sustained by a jockey in consequence of the dog's running upon the track and causing the horse to stumble and fall.

In *Muller* v. *Shufeldt* (1909) 114 N. Y. Supp. 1012, it was held that in the absence of proof of knowledge on the part of the owner of a dog's vicious character, he could not be held liable for injuries to person and property caused by the dog snapping at and frightening plaintiff's horse, causing him to run away.

In *Mabrey* v. *Haverstick* (1912) 175 Ill. App. 309, it was held that one whose negligence, if any, consisted in keeping a dog knowing his vicious propensity to frighten teams, could not reasonably have anticipated an injury which resulted where a span of colts

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driven in a negligent manner became frightened by the act of the dog in running down to the highway and barking, causing them to dash into and destroy the buggy in which plaintiff was riding.

In *Williams* v. *Brennan* (1912) 213 Mass. 28, 99 N. E. 516, where it appeared that a large dog ran toward the plaintiff's automobile, barking as he ran; that when he reached the automobile he snapped at a tire, but missed it, and his body struck a wheel, causing the automobile to skid to the other side of the road, bringing it directly in front of a horse which was being driven in the opposite direction, and which reared and descended upon the top of the automobile, causing damage for which the action was brought,—it was held that the jury was warranted in finding that the dog was the sole, direct, and proximate cause of the injury.

The owner of a dog cannot escape liability under a statute which provides that if any dog shall assault or bite or otherwise injure any person while traveling along the highway, the owner shall be liable therefor, for injuries suffered by a person kicked by his horse or thrown from his wagon in consequence of an attack by the dog, under the claim that as the dog did not bite the plaintiff, but bit the horse, the latter was the intervening cause of the injury. *Jenkinson* v. *Coggins* (1900) 123 Mich. 7, 81 N. W. 974; *Malafronte* v. *Miloni* (1913) 35 R. I. 225, 86 Atl. 146.

For other cases in which the owner of an animal was held liable for injuries caused by the frightening of a horse, without discussion of the question whether the accident was the proximate result of the breach of a duty incumbent on the defendant, see *Schmid* v. *Humphrey* (1878) 48 Iowa, 652, 30 Am. Rep. 414; *Miles* v. *Schrunk* (1908) 139 Iowa, 563, 117 N. W. 971; *Sherman* v. *Favour* (1861) 1 Allen, 191; *Denison* v. *Lincoln* (1881) 131 Mass. 236; *Chickering* v. *Lord* (1893) 67 N. H. 555, 32 Atl. 773; *Carlson* v. *McEwen* (1912) Rap. Jud. Quebec 41 C. S. 473, Ann. Cas. 1912D, 995; *Meracle* v. *Down* (1885) 64 Wis. 323, 25 N. W. 412; *Nolan* v. *Kroening* (1906) 130 Wis. 79, 109 N. W. 963 (horse frightened by dog); and *Jewett* v. *Gage* (1868) 55 Me. 538, 92 Am. Dec. 615; *Leonard* v. *Doherty* (1899) 174 Mass. 565, 55 N. E. 461, 7 Am. Neg. Rep. 55 (horse frightened by swine). E. S. O.

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[ENGLISH DIVISIONAL COURT.]

JONES *v.* LEE.

106 L. T. N. S. 123.
Also Reported in 76 J. P. 137, 28 Times L. R. 92, 56 Sol. Jo. 125.

Negligence — Horse straying on highway — Damage to cyclists — Obligation of owner or occupier of land adjoining highway.

A young horse which had been placed by the defendant in a field adjoining a highway escaped owing to a defective hedge, and strayed upon the highway.

The plaintiffs were riding a tandem bicycle along the highway, and on seeing the horse they slowed down, but the horse turned around suddenly and ran across the road, coming in contact with the bicycle. The horse fell down, and then, jumping up, lashed out and injured one of the plaintiffs and damaged the bicycle.

In an action for damages by the plaintiffs the learned County Court judge found that there was no evidence that the horse was vicious or in the habit of trespassing or attacking bicycles or anyone upon the high road. He also found that the defendant was guilty of negligence in turning the horse into a field of which the hedges were defective, but that, as the act of the horse was not one which it was in the ordinary nature of a horse to commit, the defendant was not liable.

Held, that the injury to the plaintiffs not being the natural consequence of the defendant's negligence, if any, the plaintiffs were not entitled to recover.

Per **Bankes**, J.: The learned County Court judge was wrong in law in holding that there had been negligence on the part of the defendant in turning the horse into a field with defective hedges, inasmuch as at common law there is no duty on the owner or occupier of land adjoining the highway to keep his animals off the highway.

(November 24, 1911.)

APPEAL from the decision of His Honor Judge Reginald Brown, K. C., sitting at the Market Drayton County Court.

The facts sufficiently appear from the headnote and from the judgment of Hamilton, J. (*infra*).

The learned judge in giving judgment said that the horse appeared to have been regularly used by the defendant and accustomed to go into the field. It had not been shown that the horse was vicious or in the habit of trespassing or going for bicycles or anyone on the high road. There was no vice of that

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sort. For some unexplained reason it took it into its head to go across the road at the very moment the bicycle was passing. The question was whether, under those circumstances, the defendant was liable. He must find as a fact, supposing the case should go any further, that the defendant was guilty of negligence in law in turning the young horse, although a quiet animal, into a field the hedges of which were defective. The defendant's candid admissions pointed to that fact. He knew or ought to have known that there was one or more gaps in the fence through which the horse might get into the road. In that respect there was negligence on the part of the defendant. The question then arose whether plaintiffs in law could recover for that negligence. He confessed until the authorities were quoted he should have said, if asked, that the plaintiffs would have been entitled to recover, but he was quite unable to distinguish the case from the authorities that had been cited to him. The [124] only question was whether the present case was distinguishable from *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 431, 32 L. J. C. P. N. S. 89, 9 Jur. N. S. 970, 11 Week. Rep. 435. He did not think there was any distinction because the horse kicked a child in the latter case and in the present case it kicked a bicycle. Unless it could be shown that what the horse did was in the ordinary nature of a horse to do, the defendant would not be liable. He could not say that it was the ordinary nature of a cart horse to do what was done in that case. He must give judgment for the defendant, with costs.

The plaintiffs appealed.

H. Brandon, for the plaintiffs. The learned judge was wrong in entering judgment for the defendant. He found that there was negligence upon the part of the defendant, and that there had been no contributory negligence on the part of the plaintiffs. That being so, the plaintiffs were entitled to judgment. He referred to *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 431, 32 L. J. C. P. N. S. 89, 9 Jur. N. S. 970, 11 Week. Rep. 435; *Hadwell* v. *Righton* [1907] 2 K. B. 345, *ante,* 115, 97 L. T. N. S. 133, 76 L. J. K. B. N. S. 891, 71 J. P. 499, 23 Times L. R. 548, 5 L. G. R. 881; *Higgins* v. *Searle* (1909) 100 L. T. N. S.

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280, 73 J. P. 185, 25 Times L. R. 301, 7 L. G. R. 640; *Ellis* v. *Banyard* (1911) 104 L. T. N. S. 460, 27 Times L. R. 417, 55 Sol. Jo. 500.

Herman Cohen, for the defendant. The decision of the learned judge was right, although he was wrong in holding that the defendant was guilty of negligence. The owner or occupier of land adjoining a highway owes no duty to those using the highway to fence his cattle from straying upon it. But, even supposing there had been negligence, in order to succeed the plaintiffs must show that the damage sustained by them was the natural consequence of that negligence. The act of the horse in the present case not being one which it is in the ordinary nature of the horse to commit, the case is governed by *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 431, 32 L. J. C. P. N. S. 89, 9 Jur. N. S. 970, 11 Week. Rep. 435, and the defendant was not liable.

Hamilton, J.: On the 2d April, 1911, the two plaintiffs were riding a tandem bicycle somewhere on the road between Market Drayton, Salop, and Audlem, Cheshire, and as they came down an incline on a curving road they espied a cart horse unattended in front of them, alone upon the road. They applied their brakes and slowed down, but according to their account of it—the only account that could be given—"the horse turned round suddenly and ran across to the other side into us, and its front legs fixed in the front wheel. Then it jumped up suddenly and lashed out to get free, and the machine was wrecked." The horse was knocked down by the bicycle. It turned to the left, as I understand it, towards the bicyclists. It was startled, and in falling the horse fell on the wheel, and the plaintiffs further said that "if the horse had waited an instant longer, we should have crossed it." Under those circumstances, this action was brought in the County Court for damage which the learned County Court judge assessed at 15*l.*

We have the judge's note. We have not any note of his judgment, but we have a report, verified by affidavit, taken by an experienced reporter. It is not a verbatim report, but the ordinary condensed report such as an experienced reporter takes, which reports the language of the learned judge in indirect

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speech and, to a large extent, undoubtedly condenses it. That is what we have to rely upon for ascertaining the conclusion of the judge, which was that he gave judgment for the defendant. Against that judgment it is that the plaintiffs now appeal, upon the ground that he was wrong in law, and misdirected himself as to the law applicable to the facts before him.

I think the plaintiffs are right in saying (at any rate I will assume it in their favor) that the learned judge negatived contributory negligence in fact, and negatived also any suggestion that the accident was the plaintiffs' fault. The horse was found by the judge to be free from vice, and it was said it had not been shown that it was in the habit of trespassing on the highway, or going for bicyclists or anyone else upon the high road. For some unexplained reason it took it into its head to go across the road at the very moment the bicycle was passing. The learned County Court judge, in giving judgment, said "that he must find as a fact, supposing the case should go any further, that the defendant was guilty of negligence in law in turning the young horse, although a quiet animal, into a field the hedges of which were defective. In that respect there was negligence on the part of the defendant. The question then arose whether the plaintiffs, in law, could recover for that negligence." Now I fail to understand what the learned judge meant by saying that he must find as a fact the defendant was guilty of negligence in law, and I cannot help thinking that possibly the reporter has failed quite to appreciate the learned judge's meaning and to express it so as to do justice to what he said. But assuming that the learned judge came to a conclusion of law in this matter which we should have to consider, his conclusion of law is that the defendant was guilty of negligence in law because he put a quiet young horse into a field with defective hedges. Stopping there, and without any qualifications as to where the horse might go if it got out, and what it might do if it got out, and to whom it might cause injury if it got out, it seems to me that the proposition is much too wide to be sustainable. But he passes on to say: "The question then arose whether the plaintiffs in law could recover for that negligence." If the plaintiffs were to recover in law for that negligence, apart altogether from the

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authorities that have been discussed, it is quite plain that the learned judge had to find what would be a matter of fact, *viz.*, that it was the natural and direct consequence of putting the horse into the field with defective hedges, that the horse would foul the plaintiffs' bicycle. It does not appear from the evidence how long the horse had been upon the road, what it had been doing since it escaped, or anything, except that it was upon the road, and except one scrap of evidence that somebody said the defendant said that he had just turned the horse into the field. I think, however, it is quite clear that the learned judge did not find as a fact that it was the direct consequence of putting the horse into the field that it got across the bicycle of the plaintiffs. It is said that the learned judge's next words must be supposed to fill up that gap: "He confessed until those authorities were quoted he should have said, if asked, that the plaintiffs would have been entitled to recover, but he was quite unable to distinguish the case from the authorities that had been cited to him. The only question was whether the present case was distinguishable from *Cox* v. *Burbidge* (1863) 13 C. B. N. S. 431, 32 L. J. C. P. N. S. 89, 9 Jur. N. S. 970, 11 Week. Rep. 435." I certainly cannot read that myself as equivalent to a finding of fact that there was a direct and natural cause or connection between any negligence in law, as he [**125**] calls it, in putting the horse into the field, and the accident to the plaintiffs' bicycle. That in itself seems to me to be enough to dispose of the appeal, because the plaintiffs' cause of action clearly was negligence, and nothing else. The plaintiffs had to get a finding of fact from the learned judge sufficient to carry their case home, and without that finding of fact their case necessarily failed.

The learned judge, however, goes on to say that he did not think there was any distinction that could be usefully drawn between *Cox* v. *Burbidge, supra,* and the present case. What I think was in the learned judge's mind was this, that there were two classes of liability which are quite distinct, and which frequently, at any rate, depend on different considerations. One is the class of liability that arises from keeping a dangerous animal—an animal not *feræ naturæ,* but an animal of which the law takes cognizance of as having dangerous propensities.

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As for that class of case the question of liability has been frequently discussed and theories laid down. *Cox* v. *Burbidge, supra, May* v. *Burdett* (1846) 9 Q. B. 101, 16 L. J. Q. B. N. S. 64, 10 Jur. 692, 3 Eng. Rul. Cas. 108, and *Filburn* v. *People's Palace and Aquarium Company* (1890) 25 Q. B. D. 258, 59 L. J. Q. B. N. S. 471, 38 Week. Rep. 706, 55 J. P. 181, are the well-known authorities upon that. There is, then, another class of case where animals, be they tame or be they ferocious, have escaped on to another man's land and there done damage, as to which the law is clear enough, and need not be recalled. This case is neither the one nor the other of those, but the learned judge had before him passages in *Cox* v. *Burbidge, supra,* in which it is said (I am reading now from Erle, Ch. J., at p. 436):

"The simple fact found is that the horse was on the highway. He may have been there without any negligence of the owner; he might have been put there by a stranger, or might have escaped from some inclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff.

"But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it." The context shows the court is not referring there to the natural habit of a horse to stroll along instead of standing still, or to its being startled if some strange vehicle comes upon it from behind, but to the propensity of dogs which worry sheep and the propensity of bulls and cows to attack passers-by. Then Williams, J. (it is true in a like connection), says: "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass.

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Whether or not the escape of the animal is due to my negligence is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner of it may have a property in it which is recognizable by law." Then the judgment of Willes, J., is to the like effect. "The important circumstance in this case is that the act was not in accordance with the ordinary instinct of the animal, which was not shown to be of a mischievous disposition. Does, then, the fact of the horse being on the highway make any difference? No doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly, the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine. But that is not the cause of the mischief here. It comes round, therefore, to the question, whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief." In this connection the well-known judgment of Blackburn, J., in the case of *Fletcher* v. *Rylands* (1866) L. R. 1 Exch. 265, 14 L. T. N. S. 523, may be referred to. He there said: "The law as to 'cattle' seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too." The learned judge had *Cox* v. *Burbidge, supra,* and other similar cases before him, and I take it had said to himself: "This is not the case of injury done by a vicious horse with proof of *scienter* on its owner's part. It is the case of a domestic animal which is in fact not vicious. It is not the case of trespass on the adjoining owner's property and injuries done by the trespass through defects in the defendant's fence. It is not a case of an attack upon the person of the plaintiff by some ferocious animal; it is simply

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what is called an action for damages for negligence where the injury resulted from some breach of duty towards the plaintiff on the part of the defendant." "Having had those cases brought to my attention," the learned County Court judge goes on to say, "I do not think that the circumstances of this case connect the injury done with the negligence which I have found in turning a young horse, though a quiet animal, into a field the hedges of which were defective." If that is so, his judgment was rightly entered for the defendant, and it becomes unnecessary to consider what qualifications ought to have been added to his proposition to make it right in law to say that there was negligence in the sense of a breach of duty towards the plaintiff in putting the young horse, though a quiet animal, into a field the hedges of which were defective.

The result is that the plaintiffs' appeal fails because, without discussing at large authorities which I think are well settled and well known, it is plain that they never obtained from the County Court judge an integral part of the finding of fact which constituted a proper cause of action. The appeal will therefore be dismissed, with costs.

[126] **Bankes, J.:** I agree. This case is no doubt one of very considerable importance to owners and occupiers of land adjoining a highway. I think that the law really with regard to such persons and their liability for straying animals upon the highway is very well settled, and I think that the learned judge quite correctly appreciated what the law was, and correctly applied it. The law undoubtedly is different with regard to a straying animal which is known by its owner to be a dangerous animal, and the law applicable to an animal which is a quiet, inoffensive, domestic animal, or, at any rate, an animal not known by its owner to be dangerous. I do not propose to say anything with regard to the liability of an owner of a dangerous animal which is found straying on the highway and causes damage to a passer-by, because that question does not arise in this case. The question in this case has reference only to an ordinary domestic animal, which the County Court judge had found to have been a quiet animal, and, at any rate, not known to be dangerous.

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The plaintiffs were ordinary passers-by on the highway, and if they meet with an accident on the highway from collision with a straying animal, in order to succeed against the owner of that animal, assuming it to be a quiet, inoffensive animal, and not known to its owner to be dangerous, they have got to establish that the injury of which they complain was the result of some breach of duty towards them on the part of the owner of that animal.

First of all, What is the duty of an owner or occupier of land adjoining a highway with regard to keeping animals off the highway, or fencing his land so as to prevent animals getting on to the highway? By common law there is no such duty at all, and we have not to-day heard any argument as to whether any duty can be created under the highway act. I am not going to consider that for the purpose of my judgment. Suffice it to say by common law the owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highways. The plaintiffs, therefore, in this case seem to me to fail in establishing the first point which is necessary to establish; namely, any duty as between the owner of this animal and themselves. The County Court judge in my opinion was wrong in saying that he thought the defendant was guilty of negligence in law in turning the young horse, although a quiet animal, into a field the hedges of which were defective. But be that as it may, in order to succeed in this case the plaintiffs would certainly have to show, even assuming that the owner of this horse had been guilty of negligence in allowing it to get on to the highway, that the horse was one which, to its owner's knowledge, was of a disposition likely to cause the particular damage complained of. The County Court judge has, according to my reading of his judgment, found that fact against the plaintiffs, and, therefore, whether he was right or wrong in his first finding, in my opinion, it was necessary for the plaintiffs to establish the second proposition to which I have referred. Not only did they fail to establish it, but the County Court judge upon the evidence found against them on it.

On those grounds I think the learned County Court judge was quite right, and in this particular case the plaintiffs have entirely failed to show that there was any duty on the owner of this

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animal as between himself and the plaintiffs, and that the plaintiffs therefore wholly failed in establishing the case which they sought to establish against the defendant.

Appeal dismissed.

Solicitors for the plaintiffs: *Norris, Allens, and Chapman, for T. H. Smith, Audlem.*

Solicitors for the defendant: *J. M. Voss, for A. E. Whittingham, Nantwich.*

Note.—For annotation of the question involved in JONES v. LEE, see note to HADWELL v. RIGHTON, *ante*, 115.

[ENGLISH DIVISIONAL COURT.]

IN RE GIBBS.

MARTIN *v.* HARDING.

[1907] 1 Ch. 465.

Also Reported in 76 L. J. Ch. N. S. 238, 96 L. T. N. S. 423.

Will — Construction — "Residuary legatee" — Real estate — Specific disposition of entirety at date of will — Subsequent acquisition of further real estate — Intestacy — Extrinsic evidence.

Testatrix, by her will dated in 1891, after giving a pecuniary legacy "free of income tax," and specifically disposing of certain real estate "free of legacy duty," "bequeathed" a freehold cottage to E. J. H. She then directed that all her household furniture and other chattels should be sold, reserving the right to E. J. H. to retain any special articles she might wish for, "all else to be sold." Then, after disposing of her jewelry, she concluded, "I leave the aforesaid E. J. H. my residuary legatee." All the real estate which she possessed at the date of her will was thereby specifically disposed of. She died in 1903, having in the meantime purchased other real estate:—

Held, that in considering whether the naming of a "residuary legatee" constituted a residuary devise, the fact that at the date of the will the testatrix possessed no real estate other than that specifically and completely disposed of must be borne in mind; but that there was not sufficient context in this will to modify the prima facie meaning of the term "residuary legatee;" and, consequently, that the subsequently

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acquired real estate did not pass to E. J. H., but was undisposed of by the will.

(February 21, 1907.)

THE testatrix, H. L. Gibbs, by her will dated March 25, 1891, gave and bequeathed to her niece Ann James and to her niece Mary Elizabeth James 300*l.* "free of income tax" to be equally divided between them. She further gave to them certain cottages in Stratford-on-Avon "with power to sell or otherwise as they may agree also free of legacy duty." Then, after making various specific bequests of furniture and giving certain pecuniary legacies, she continued: "And to my dear friend Emily Jane Harding, of Elm street, Stratford-on-Avon, I bequeath my freehold property known as the Cottage Old Town Stratford-on-Avon, with stabling, coachhouse, garden, etc., in short, all appertaining to the same. At this date, March 25, 1891, there is 400*l.* remaining on mortgage of property in Wood street, belonging to and in the occupation of [**466**] Mr. William Shakespeare (Stratford-on-Avon), this I direct to be called in. Also a mortgage of 300*l.* granted to the late William Barnes-Eaves by the late James Ward. This I have received notice of repayment on or before the 27th of April next 1891, out of the above sums I direct that the mortgage of 500*l.* due to Mr. John James Nason on my property the Cottage Old Town Stratford-on-Avon be paid off and the deeds handed over to the aforesaid Emily Jane Harding. Further, I desire that all my household furniture, ornaments, glass, china, pictures, and other chattels (reserving the right to the aforesaid Emily Jane Harding to retain any special articles she may wish for) may be sold either privately or by auction, curiosities also. My dear father's portrait I wish given to Ann James aforesaid and the plate marked AAB. The salt cellars so marked I give to Emily Jane Harding. All else to be sold." Then, after disposing of certain articles of jewelry, she continued: "I leave the aforesaid Emily Jane Harding my residuary legatee and executrix, and I appoint Charles E. Martin as executor with Emily Jane Harding. All moneys belonging to me at the time of my decease I desire to be paid in to my executrix and executor, and all my just debts discharged."

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The testatrix did not by her will specifically dispose of a freehold messuage known as 18, Old Town, Stratford-on-Avon, to which at the time of her decease she was entitled in fee simple, but which she had purchased after the date of her will. At the date of her will she had no real estate other than that which was thereby specifically disposed of. She died on January 19, 1903. This summons was taken out by C. E. Martin to determine the question whether, according to the true construction of the will, the freehold messuage known as 18, Old Town, Stratford-on-Avon, passed thereunder to Emily Jane Harding as residuary legatee.

There being some difficulty in ascertaining who was the heir at law, the defendant Brind was, by the direction of the court, added as a defendant to represent the heir at law.

T. T. Methold, for the plaintiff.

Maugham, for E. J. Harding. On the whole will there is sufficient context to enable the court to construe the expression [**467**] "residuary legatee" as applying to real estate. The testatrix, in disposing of her real estate, uses words which are applicable to personal estate. Moreover, there is a direction to sell. The words, "all else to be sold," are not referable to the chattels only. *Singleton* v. *Tomlinson* (1878) 3 App. Cas. 404, 38 L. T. N. S. 653, 26 Week. Rep. 722; *Hughes* v. *Pritchard* (1877) 6 Ch. D. 24, 48 L. J. Ch. N. S. 840, 37 L. T. N. S. 259, 25 Week. Rep. 761. *In Re Methuen and Blore's Contract* (1881) 16 Ch. D. 696, 50 L. J. Ch. N. S. 464, 44 L. T. N. S. 332, 29 Week. Rep. 656, is distinguishable, inasmuch as there was there no direction for sale. In *Evans* v. *Crosbie* (1847) 15 Sim. 600, 16 L. J. Ch. N. S. 494, 11 Jur. 510, there was less context than in the present case, and yet the words were held to pass real estate.

Beebee, for the defendant Brind. "Residuary legatee" cannot be construed as meaning "residuary devisee" unless the context is very clear. *In re Methuen and Blore's Contract* (1881) 16 Ch. D. 696, 50 L. J. Ch. N. S. 464, 44 L. T. N. S. 332, 29 Week. Rep. 656. The court will not admit extrinsic evidence as to the condition of the property at the date of the will

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in order to contradict the plain meaning of the language used in the will. *Higgins* v. *Dawson* [1902] A. C. 1, 71 L. J. Ch. N. S. 132, 50 Week. Rep. 337, 85 L. T. N. S. 763. The words, "all else to be sold," having regard to their position in the will, cannot refer to anything but the chattels. It is said that the testatrix, in disposing of her real estate, only used words applicable to personalty, and that therefore the expression "residuary legatee" occurring in another part of the will ought to be construed as "residuary devisee." *In re Morris* (1894) 71 L. T. N. S. 179, was a somewhat similar case, and yet the undisposed of real estate was there held not to pass to the "residuary legatee."

Maugham, in reply. In *In re Morris* (1894) 71 L. T. N. S. 179, there was no such inapt use of language as in this case. In *In re Methuen and Blore's Contract* (1881) 16 Ch. D. 696, 50 L. J. Ch. N. S. 464, 44 L. T. N. S. 332, 29 Week. Rep. 656, Jessel, M.R., expressly relied upon the fact that there was no gift of real estate, and indicated that if it had been otherwise he would have held "residuary legatee" to mean "residuary devisee." That case is different from the present. On construction the direction, "all else to be sold," is a perfectly general phrase, and cannot be cut down as applying only to the chattels. In so loosely drawn a will the position of that direction ought not to be regarded as important. For the purpose of construction the court will have regard to the state of the property at the date of the will.

[468] **Joyce,** J.: The question in this case is whether in this will the designation of Emily Jane Harding as residuary legatee and executrix constitutes a residuary devise so as to pass certain freehold property which was not acquired by the testatrix until some time after she made her will, and is not otherwise disposed of thereby. It has been observed that the will is loosely and incorrectly drawn. The testatrix gives and bequeaths to two nieces a pecuniary legacy "free of income tax." She gives freehold cottages "free from legacy duty," and, as in *In re Morris* (1894) 71 L. T. N. S. 179, which has some points of similarity with the present case, the testatrix "bequeaths" other freehold property. The word "bequeath," however, though more correctly

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applied to personal estate, is not strictly so limited. It does not follow from its being used by this testatrix in disposing of real estate that when she names her "residuary legatee" she meant thereby "residuary devisee" or "residuary legatee and devisee."

It is well settled that the words, "residuary legatee," by themselves prima facie do not apply to real estate, though their application may be extended so as to do so when the context requires it, and when a testator directs his real estate to be sold and disposes of part of the proceeds, it may be taken, I think, that the appointment of a residuary legatee will pass the rest. The phrase, "all else to be sold," however, in this will, having regard to the position in which it occurs, cannot, I think, be fairly considered to have any application to real estate, but only to furniture and chattels, especially as the real estate of the testatrix is all of it specifically disposed of by preceding clauses.

It may be arguable that when a testator, after specific dispositions of parts of his real estate, appoints a residuary legatee, such legatee will take the residue of his real estate; but if this argument ought to be allowed to prevail in such a simple case, I think there is a material difference where the will contains specific dispositions of all the real estate, and the person named as residuary legatee is one of the specific devisees. In the present case she is the person who takes under the last specific devise in the will. No doubt *Higgins* v. *Dawson* [1902] A. C. 1, 71 L. J. Ch. N. S. 132, 50 Week. Rep. 337, 85 L. T. N. S. 763, decides that the condition of a testator's assets ought not to be gone into and [469] considered for the purpose of altering the meaning of language in itself perfectly clear and well applicable to definite objects in the condition of things to which the will refers. But, as Lord Cairns says in *Charter* v. *Charter* (1874) L. R. 7 H. L. 364, 377, "the court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied." See also per Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1877)

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2 App. Cas. 743, 763, 47 L. J. Q. B. N. S. 193, 1 Eng. Rul. Cas. 308. Accordingly I think the fact that at the date of the will this testatrix had no real estate other than that of which the will contains specific and complete dispositions may be and must be borne in mind in considering whether the naming of a residuary legatee constitutes a residuary devise. The prima facie and regular meaning of the term "residuary legatee" is the person taking what the law calls the residue of the personal property. It would be unsafe, and might throw doubt upon titles, if the court were to depart from the plain and settled meaning of the term upon grounds not clearly sufficient, and when it is not abundantly clear that the will was intended by the testatrix to pass the real property concerning which the question arises. In the present case I think that there is not sufficient context to modify the prima facie meaning of the term residuary legatee, and I hold the subsequently acquired real estate to be undisposed of by the will.

Solicitors: *Rawle, Johnstone, & Company, for Slatter, Son & Gibbs, Stratford-upon-Avon.*

Note.—When will the appointment of a "residuary legatee" amount to a gift of undisposed of realty.

Summarized, the effect of the decisions on the question above stated is this, that the words, "residuary legatee," have a definite and technical sense in which they describe the beneficiary of a gift of personalty only; but that, as remarked by Lord Cranworth in *Windus* v. *Windus* (1856) 6 De G. M. & G. 551, "there is indeed no magic in the words themselves, and if they are so used by a testator, they may, no doubt, be construed as referring to real estate. Any man may use his own nomenclature if he only expresses what he means." Among the indications of an intention to use the words in a broad sense, so as to carry residuary realty as well as personalty, are the inapt use of the terms "legatee" or "legacy," or the word "bequeath," in connection with the gift of realty in other parts of the will (*Cf. Day* v. *Daveron* (1841) 12 Sim. 200, 10 L. J. Ch. N. S. 349; *Re Salter* (1881) 44 L. T. N. S. 603,—*infra*); the treatment of realty and personalty as a mixed fund for the purpose of testamentary disposition (*Cf. Warren* v. *Newton* (1844) Dru. 464; *Evans* v. *Crosbie* (1847) 15 Sim. 600, 16 L. J. Ch. N. S. 494, 11 Jur. 510; *Wildes* v. *Davies* (1853) 1 Smale & G. 475, 22 L. J. Ch. N. S. 495, 1

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Week. Rep. 253; *Singleton* v. *Tomlinson* (1878) 3 App. Cas. 404, 38 L. T. N. S. 653, 26 Week. Rep. 722; *Re Salter* (1881) 44 L. T. N. S. 603; *Cooney* v. *Nicholls* (1881) Ir. L. R. 7 Eq. 107; *Dann* v. *Canfield* (1908) 197 Mass. 591, 84 N. E. 117, 14 Ann. Cas. 794,—*infra*); and a manifest intention to dispose of the testator's entire estate (*Cf. Pitman* v. *Stevens* (1812) 15 East, 505; *Hughes* v. *Pritchard* (1877) 6 Ch. D. 24, 46 L. J. Ch. N. S. 840, 37 L. T. N. S. 259, 25 Week. Rep. 761; *Re Stephen* (1913) W. N. 210, 135 L. T. Jo. 240, 48 L. J. N. C. 421; *Cooney* v. *Nicholls* (1881) Ir. L. R. 7 Eq. 107; *Re Greally* [1910] 1 I. R. 239; *Laing* v. *Barbour* (1876) 119 Mass. 523,—*infra*). The fact that a will made by a testator possessing both real and personal property disposes of personalty only is ordinarily conclusive of an intention to use the phrase only in its limited or technical sense. (*Cf. Lea* v. *Grundy* (1855) 1 Jur. N. S. 951, *infra*); on the other hand, the fact that the will disposes of both realty and personalty is not of itself conclusive of an intention that realty shall be included in the residuary gift.

In *Cooney* v. *Nicholls* (1881) Ir. L. R. 7 Eq. 107, Fitz Gibbon, L. J., said: "It seems to me that we could not hold that the existence in a will of specific devises of realty enlarged the operation of the appointment of a residuary legatee without fully adopting as a principle of construction that whenever a will disposes specifically of any real estate, or even of any interest in any real estate, the whole residue of the testator's real property must pass under the appointment of a residuary legatee. Such a principle seems to be a novelty, and it would, in my opinion, be an abrogation, if not a complete reversal, of the old rule that a 'residuary legatee' prima facie takes the residue of personal property only, as alone belonging to that class of property to which other 'legatees' in the strict sense must look for payment."

The fact that the will disposes specifically of any real estate is, however, a circumstance of considerable weight, especially when considered in connection with any language in the will, at the beginning or elsewhere, indicating an intention to dispose of the testator's whole estate, or indicating that the real and personal estate constitute a common fund. *Dann* v. *Canfield* (1908) 197 Mass. 591, 84 N. E. 117, 14 Ann. Cas. 794.

An appointment of a "residuary legatee," standing alone in a will, is a gift of the personal estate only; but as persons not well educated, or at least not well instructed in law, frequently use the term "legatee" as designating a person who, by virtue of the gift, is to take land as well as personalty, and as in common parlance the term implies any person who received a benefit under a will, the courts in construing the term will look at the context for the purpose of getting at the real meaning of the testator. *Ibid.; Windus* v.

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Windus (1856) 21 Beav. 373, affirmed in 6 D. M. & G. 549, 26 L. J. Ch. N. S. 185, 2 Jur. N. S. 1101; *Singleton* v. *Tomlinson* (1878) 3 App. Cas. 404, 38 L. T. N. S. 653, 26 Week. Rep. 753; *Re Morris* (1894) 71 L. T. N. S. 179; *Re Greally* [1910] 1 I. R. 239.

Instances in which the meaning of the term "residuary legatee" has been enlarged by the context.

In *Pitman* v. *Stevens* (1812) 15 East, 505, where a testator, seised in fee of certain real estate, by his will provided: "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever after my just debts are paid. I do hereby appoint Captain Robert Preston my residuary legatee and executor," and gave certain annuities and legacies, with a desire to his legatee and executor to let his sister be interred in the testator's vault, and with a recommendation to him to be kind to another relation and to do something handsome for him,—it was held that in view of the expression of an intention to dispose of all he had, and the fact that the testator contemplated that his residuary legatee and executor would have the disposition of his whole funds, there was sufficient in the context to enlarge the ordinary meaning of the words, "residuary legatee."

In *Day* v. *Daveron* (1841) 12 Sim. 200, 10 L. J. Ch. N. S. 349, where testator in a will by which he gave a freehold house to his wife "for her sole use and benefit," and another freehold house to her for life, and also all his household goods, plate, linen, books, and wearing apparel, with the proviso that if his wife should marry after his decease, then "the whole of the above property shall become the property of my daughter," and concluding with the appointment of his wife "sole executrix and residuary legatee to all other property I may possess at my decease," and then proceeded to deal with his "funded property," it was held to be clear that the residuary clause was not meant to relate to personal property alone.

In *Davenport* v. *Coltman* (1842) 9 Mees. & W. 481, a testator, evidently unskilled in the use of legal phraseology, made a will by which he gave certain specific and pecuniary legacies to his sons and daughters, and gave to his wife during her natural life "the possession of" his house, "together with the use of the plate, china, linen, and household furniture, and all the joint property in houses in Liverpool, and likewise of interest of money as often as due arising from the £3 and £4 per cents, and to have and to hold the same during her natural life, save and except the clauses in favor of my daughter as already mentioned. At her decease it is my will and pleasure that [the daughters] shall divide equally between them as residuary legatees whatever I may die possessed of, except what is already mentioned in favor of others." It was held that the daughters took an estate in fee in remainder in the real property, expect-

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ant on the death of the testator's widow. And this opinion was concurred in by the Vice Chancellor in 12 Sim. 588, 11 L. J. Ch. N. S. 262, 6 Jur. 381.

In *Evans* v. *Crosbie* (1847) 15 Sim. 600, 16 L. J. Ch. N. S. 494, 11 Jur. 510, where testator by a will, loosely and unskilfully expressed, gave all his real and personal estate "upon trust by or out of the personal estate, or by sale, mortgage, or other disposition of the real estate, or any part thereof, to pay" certain pecuniary legacies, saying, "I leave and bequeath unto my brother, D. C., the sum of 2,000*l.*, and also to be my residuary legatee,"—it was held that as the testator had treated his estate as a mixed fund, the residuary gift embraced the real as well as the personal property. But in *Windus* v. *Windus* (1856) 6 De G. M. & G. 549, 26 L. J. Ch. N. S. 185, 2 Jur. N. S. 1101, Lord Cranworth spoke of the foregoing decision as being based upon unsatisfactory reasoning, saying that the judge deciding it seems to have thought that the legacy being to be raised out of the real estate gave a construction to the term "residuary legatee," but that it was doubtful whether such is a legitimate mode of reasoning.

In *Hughes* v. *Pritchard* (1877) 6 Ch. Div. 24, 46 L. J. Ch. N. S. 840, 37 L. T. N. S. 259, 25 Week. Rep. 761, where testator by commencing his will with the words, "as to my estate which God has been pleased to bestow upon me, I do make and ordain this my last will and testament as follows," evidenced an intention to dispose of all of his estate, and specifically disposed of portions of his realty, and ended with the words, "and I make my [sister, brother, and brother-in-law] my residuary legatees," it was held that though the appointment of residuary legatees standing alone in the will would be a gift of personal estate only, the context showed that the undisposed of realty was intended to be embraced in the residuary gift.

In *Re Salter* (1881) 44 L. T. N. S. 603, testatrix by a will in which she disposed of real estate and gave certain pecuniary legacies, with the proviso that if her estate would not produce those sums after the previous legacies were paid, then those sums were to abate, appointed a certain person "to be my residuary legatee." It was held, in view of the leaning of the court against intestacy, and the fact that the testatrix had, in a gift of realty, used the word "bequeath," which is properly applicable only to personalty, and as she had constituted a mixed fund out of her real and personal estate out of which legacies were to be paid, that the residuary clause could be taken to dispose of real as well as of personal property.

In *Re Stephen* [1913] W. N. 210, 135 L. T. Jo. 240, 48 L. J. N. C. 421, testator, by his holographic will, appointed his two daughters "to be my residuary legatees to any of my belongings wherever found, and not already mentioned in this will." He then made numerous specific dispositions to his son and his two daughters of his real and

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personal property, comprising in fact all the property that he had at the date of his will. In the course of these dispositions he used the words, "leave and bequeath," in several instances where real property was disposed of. It was held by Eve, J., though with considerable doubt, that in view of the clear intention of the testator not to die intestate, coupled with his inapt use of the words, "leave and bequeath," and having regard to the terms of the gift to the residuary legatees, which was intended to provide for every possible contingency, that the context was wide enough to sweep in real property purchased by the testator after the making of his will. RE GIBBS was distinguished on the ground that in that case the gift of residue followed the direction to convert, which Mr. Justice Joyce said did not extend to the realty.

In *Warren* v. *Newton* (1844) Dru. 464, a testator by his will devised all his estates to three trustees, charged with various annuities and pecuniary legacies, and concluded thus, "I give, devise, and bequeath unto my said trustees to be equally divided between them, share and share alike, all the rest, residue, and remainder of my property not herein disposed of, to answer any contingency that may arise or happen with respect to the trusts of this my will, or in case of nonpayment of my rents, as also to answer the several legacies and bequests herein mentioned, and to pay the expense of agency." By a codicil testator made some alterations in his will, and proceeded thus, "I leave my brother-in-law, E. M. [one of the trustees named in the will], residuary legatee to all my property." It was held that in view of the context the undisposed of realty passed by the residuary gift.

In *Re Greally* [1910] 1 I. R. 239, where testator began his will with the words, "I give, devise, and bequeath to my aunt [naming her], whom I hereby appoint sole executrix and trustee of this my will, upon the following trusts," then proceeding to make various specific and general devises and bequests, concluding with the words, "and I nominate and appoint my said aunt as my sole residuary legatee," it was held that in view of the context the aunt was entitled to lands forming the subject of a charitable devise in the will, which lapsed by reason of testator's death within three months after the execution of the will.

In *Laing* v. *Barbour* (1876) 119 Mass. 523, where a testatrix, by a will in which she undertook to dispose of the property then owned by her "and any other property that may come into my possession," evinced an intention to dispose of both her real and personal estate, it was held that by constituting and appointing her son her "residuary legatee" she intended that the residuum of her estate, both real and personal, should pass to him.

In *Dann* v. *Canfield* (1908) 197 Mass. 591, 84 N. E. 117, 14 Ann. Cas. 794, it appeared that the testator, a man somewhat ad-

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vanced in years, had as his only heirs at law two adopted daughters, with one of whom he had held no communication for more than twenty years, and with the other of whom he was on terms of intimacy. It did not appear that he was a lawyer, or that he had any special instruction as to the technical meaning of legal terms. Thus situated, he drew up a will for himself, by which he created a trust fund for the benefit of his two adopted daughters,—who shared unequally, however,—and other persons therein named, and specifically disposed of certain real and personal property, and concluded: "I hereby name and constitute my adopted daughter L. H. C. as my residuary legatee." By the express language of the will certain portions of the first trust fund created were, upon the death of the life beneficiaries, to revert to "my general estate," showing that he evidently regarded his general estate, both real and personal, as one common fund. It was held that there was enough in the will, when taken in connection with the fact that testator had not confined himself therein to the disposition of his personal estate, to show that he intended the remainder of his real estate to pass to the residuary legatee.

Where the will directs the testator's real estate to be converted into money, not for a special purpose only, but for the general objects of the will, the person appointed "residuary legatee" will take the surplus. *Singleton* v. *Tomlinson* (1878) 3 App. Cas. 404, 38 L. T. N. S. 653, 26 Week. Rep. 722; *Wildes* v. *Davies* (1853) 1 Smale & G. 475, 22 L. J. Ch. N. S. 495, 1 Week. Rep. 253.

Instances in which the context has been held insufficient to overcome the prima facie signification of the term "residuary legatee."

In *Kellett* v. *Kellett* (1815) 3 Dow. P. C. 248, where a testator bequeathed various legacies "to be raised and levied from my properties by my executors," and, after specifically devising his interest in certain lands, said: "The remainder of my properties I devise to my executors to make good the above sums. . . . And I also ordain, appoint, and devise the said [persons named] executors to this my last will and testament, also my residuary legatees, share and share alike,"—it was held that though the case was a doubtful one, there was not sufficient evidence of a contrary intention to warrant a reversal, in the face of the rule that the heirs shall not be disinherited unless the court can discover an evident intention to do so, of the decision of the court below that the residuary gift was of personalty only.

In *Doe ex dem. Roberts* v. *Roberts* (1841) 7 Mees. & W. 382, where testator, after directing the payment of debts and funeral expenses, bequeathed several pecuniary and specific legacies, and devised certain lands, ending with the words, "and I do hereby nominate, constitute, and appoint my son, W. R., and my daughter, E. R., joint

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executors and residuary legatees of this my last will and testament," —it was held that there was nothing in the context to vary the prima facie meaning of the residuary gift as carrying personalty only.

In *Wills* v. *Wills* (1841) 1 Drury & War. 439, a testator, after devising all his real estate upon trust, first to pay debts and legacies, and then to convey as directed, concluded thus, "And as to all my personal estate of what nature or kind soever, subject, however, to my debts and legacies hereinbefore bequeathed, I give and bequeath same to my relative William Robert Wills, whom I appoint executor of this my will, and also, in case of any residue, I appoint him my residuary legatee." Apparently by inadvertence, the testator, in disposing of his real estate, did not dispose of rents and profits pending the event upon which one of the dispositions was to take effect. It was held that the residuary clause did not carry such interest.

In *Lea* v. *Grundy* (1855) 1 Jur. N. S. 951, where a testator who at the time of his decease was seised of certain copyhold estate, of which he made no mention specifically in his will, therein bequeathed certain chattels and a legacy to his daughter, and declared her to be his sole residuary legatee, it was held that as there was nothing to show that the testator meant to dispose of real as well as of personal estate, the copyholds did not pass under the residuary clause.

In *Windus* v. *Windus* (1856) 21 Beav. 373, affirmed in 6 De G. M. & G. 549, 26 L. J. Ch. N. S. 185, 2 Jur. N. S. 1101, testator, having four sons and five daughters, provided legacies for each of his sons and daughters, and gave the residue of his personal estate to his two elder sons, and devised to them all his freehold, copyhold, and leasehold estates as tenants in common between them. In the following year the eldest son died without issue and intestate, so that a lapse took place of the devise of one moiety of the real estate and of the bequest of one moiety of the residuary estate. The testator thereupon made a codicil by which he appointed an executor in the place of the deceased son, and revoked the legacies given to two of his sons by the will and appointed them "residuary legatees," and declared that certain freehold and leasehold property, over which he had a power of appointment, should go to the "residuary legatees, his sons." It was held that as the testator had elsewhere used the word "legacy" only with reference to personal estate, and as in the original will he had made a distinction between the disposition of his real and of the residue of his personal estate, the gift to the "residuary legatees" could not be taken to include the lapsed interest in the freehold estates devised to the deceased son.

In *Re Methuen* (1881) 16 Ch. D. 696, testatrix, having at the time no real estate, made a will in which she stated, "I commit to paper my wishes respecting the disposal of my property, and give this as my last will and testament. Everything I am possessed of I leave to my . . . sister . . . for her life. After her de-

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cease I give and devise as here annexed." Then followed a number of pecuniary legacies, and the will proceeded as follows: "My two nephews [naming them] I leave my executors, and the latter residuary legatee after the demise of my sister," and then followed other legacies, with respect to one of which the word "devise" was used. It was held that in view of the fact that the real estate was after acquired (the presumption against a person who makes a will dying intestate as to any part of the property which he has not being so strong as regards property which he has not), there was not sufficient in the context to overcome the prima facie meaning of the words, "residuary legatee;" though it was said that it would have made a great difference if specific freehold property had been given by the will itself and then the residue given over.

In *Re Morris* (1894) 71 L. T. N. S. 179, where testator gave all his lands, tenements, and hereditaments to his wife for life "wheresoever and whatsoever, real and personal," then, after bequeathing some pecuniary legacies, proceeded, "and to this my last will and testament I appoint and direct and make my dear wife . . . sole executrix to this my will, and also at the same time I appoint and make her my residuary legatee,"—it was held that the appointment of the wife as residuary legatee did not make her also a devisee of the undisposed-of remainder interest in testator's real estate.

In *Hillas* v. *Hillas* (1847) 10 Ir. Eq. Rep. 134, it appeared that the testator had devised certain real estate to his son, some in tail with remainder over to testator's daughter in tail, remainder over to another, and some in fee, and devised and bequeathed "the rest and residue of my estate and property, real and personal, not before specifically disposed of" to his son. Upon the son's death, he executed a codicil in which he recited the death of the son and the fact of the devise to him and after the son's decease without issue to testator's daughter and her issue, and then devised the aforesaid estates, in case his daughter should die without issue in her mother's lifetime, to his wife for life, and after her decease, then as provided in the will, and ended by appointing his daughter sole executrix and residuary legatee. It was held that there was no intention sufficiently evinced that the daughter was to be substituted for the son as general residuary legatee and devisee, and that she did not take the residuary realty.

In *Cooney* v. *Nicholls* (1881) Ir. L. R. 7 Eq. 107, where by codicil testator gave certain houses to his wife for life, and added, "I appoint my nephew, G. C., my residuary legatee," it was held that there being no preliminary statement importing the determination of testator not to die intestate as to any part of his property, no clear use of the word "legacy" as applicable to land in one part of the will, which would compel a similar application of it to other portions

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of it, and no mixing up of the realty and personalty with a disposal of part and bestowal of the residue after charges and deductions, there was nothing in the context to vary the ordinary meaning of the words, "residuary legatee," and therefore that real estate did not pass by the residuary gift.

In *Gethin* v. *Allen* (1888) Ir. L. R. 23 Eq. 236, where the will contained no expressed intention to dispose of testator's entire property, it was held that though the testator used the word "bequeath" in disposing of realty, and though the will disposed of realty as well as personalty, the designation of a certain person as "residuary legatee" did not also constitute him residuary devisee.

Effect of residuary bequest to pass realty, as affected by fact that realty is after acquired.

That the fact that a will disposes of all the real estate owned by the testator at the time it was made, or the fact that he owned no real estate at the time, is insufficient to warrant a construction of the residuary clause as carrying after-acquired realty, see *McAleer* v. *Schneider* (1894) 2 App. D. C. 461; *Warner* v. *Swearingen* (1837) 6 Dana, 196; *Blaisdell* v. *Hight* (1879) 69 Me. 306, 31 Am. Rep. 278; *Rea* v. *Twilley* (1871) 35 Md. 409; *Smith* v. *Hutchinson* (1875) 61 Mo. 83; *Havens* v. *Havens* (1844) 1 Sandf. Ch. 324; *Lynes* v. *Townsend* (1865) 33 N. Y. 558; *Price's Appeal* (1895) 169 Pa. 294, 32 Atl. 455; *Smith* v. *Edrington* (1814) 8 Cranch, 66, 3 L. ed. 490.

But in *Webb* v. *Archibald* (1894) — Mo. —, 28 S. W. 80, s. c. in banc 128 Mo. 299, 34 S. W. 54, where a will disposed of all the land owned by the testator at the time of making it, after-acquired land was held to pass under a residuary clause disposing of "the balance of my property."

So, also, in *Jacobs's Estate* (1891) 140 Pa. 268, 11 L.R.A. 767, 23 Am. St. Rep. 230, 21 Atl. 318, it was held that the words, "the remainder and residue of my money," in a will made by one who had no real estate at the time passed after-acquired realty, where the will, by disposing of all the estate possessed by testatrix at the time the will was made, showed, an intent not to die intestate, and to exclude the heirs except as they were given legacies.

That after-acquired realty will not pass under a residuary bequest of personalty, by reason of a direction that within one year after testator's death all his property should be turned into cash, see *Bradford* v. *Matthews* (1896) 9 App. D. C. 438. E. S. O.

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[ENGLISH COURT OF APPEAL.]

HOOPER *v.* HERTS.

[1906] 1 Ch. 549.
Also Reported in 75 L. J. Ch. N. S. 253, 54 Week. Rep. 350, 94 L. T. N. S. 324, 13 Manson, 85.

Company — Shares — Transfer — Blank transfer — Mortgage — Filing in blank by mortgagee — Refusal to register — Implied obligation of transferrer not to hinder registration — Derogation from grant — Damages.

Upon a transfer for value of shares in a limited company the transferrer is under an implied obligation, arising from the relation of grantor and grantee constituted between the parties by the transfer, not to prevent or delay the registration of the transferee as owner of the shares.

W. executed a transfer in blank of certain shares in a mining company of which he was the registered owner, and handed over the blank transfer and the share certificate to H. with authority to raise money upon them for H.'s own use. At H.'s request the plaintiff obtained from a bank a temporary loan to himself on the security of the blank transfer and share certificate, and paid over the money to H. upon H. undertaking to repay the loan and authorizing the transfer of the shares to the bank or their nominee in default of payment. Default having been made in payment by the plaintiff and by H., who absconded, the bank, with the plaintiff's concurrence, filled in the plaintiff's name in the blank transfer, and the plaintiff executed the transfer, under circumstances which precluded W. from asserting that the transfer was unauthorized. The transfer having been lodged at the company's offices for registration, W. put a stop on the registration. The shares subsequently fell in value:—

Held, that W. was under an implied obligation to the plaintiff not to delay registration, and that the plaintiff as mortgagor had a sufficient interest in the shares to entitle him to claim damages for the breach of that obligation.

(February 14, 1906.)

APPEAL from a decision of Kekewich, J.

On January 8, 1904, the Rev. A. Whatton, who was associated with Mr. A. Carlisle Herts, a company promoter, in certain speculative dealings in shares, delivered to Herts a transfer executed by him in blank of 1,467 shares in the Smelting & Refining Company of Australia (1901), of which he was the

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registered owner, together with the certificate of the shares, and verbally authorized Herts to obtain a temporary loan on the security of the shares for his (Herts's) own private use. On January 13, 1904, Whatton wrote to Herts: "With regard to the [550] Smelting shares, I am anxious to know what you have done or can do. Please don't postpone the matter if you have not already seen about it. One ought to be able to borrow on those shares up to a good value at 4 per cent."

In the meantime, on January 9, Herts obtained from the plaintiff, Mr. Charles Hooper, to whom he was indebted in the sum of 150*l.* for rent, an advance of 50*l.*, and deposited with him the blank transfer and certificate as security for the advance, and on January 12 he obtained from the plaintiff a further advance of 50*l.*

On January 14, he applied to the plaintiff to procure him a loan of 700*l.* on the security of these shares. The plaintiff, being unable to find the money himself, applied to the Mines & Banking Corporation to lend him the money. The corporation, upon being shown Whatton's letter of January 13, agreed to lend to the plaintiff 700*l.* upon the security of the shares, with interest at 10 per cent, the loan to be repaid within fifteen days from being made. Herts, upon being informed by the plaintiff of the decision of the corporation, wrote him a letter whereby he authorized him to raise 700*l.* on the shares at 10 per cent interest, deducting from the amount so obtained 150*l.* for rent and 50*l.* for cash advanced on January 12, and undertook to indemnify him against any loss arising from the transaction, and if necessary to redeem the shares in two weeks' time. The plaintiff thereupon handed to the corporation the blank transfer and share certificate, and received from them the sum of 700*l.* This sum he paid to Herts by three cheques of 450*l.*, 200*l.*, and 50*l.* Herts indorsed the cheque for 200*l.* and returned it to the plaintiff and kept the other two cheques. He then signed the following receipt, dated January 14, 1904: "Received of Charles Hooper the sum of seven hundred pounds (700*l.*), amount advanced by the Mines & Banking Corporation, Limited, at the rate of 10*l.* per cent per annum interest, on 1,467 fully-paid 7 per cent preference shares in the Smelting & Refining Company of Australia, on the under-

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standing that the amount be repaid in fifteen days or the shares may be transferred into the name of the corporation, or their nominee, and, in the event of any sale of same being effected, the difference [551] between the amount obtained and the 700*l.* with interest, if any, to be made good by me."

The plaintiff asked Herts to return him the cheque of 50*l.* in repayment of the advance made by the plaintiff to Herts on January 9, but, upon Herts representing to the plaintiff that he could not then spare the money and promising to repay the 50*l.* in a few days, the plaintiff allowed him to keep the cheque. This money was never repaid. On March 25, 1904, the loan of 700*l.* not having been repaid by either the plaintiff or Herts, the corporation, with the assent of the plaintiff, filled in the blank transfer with the plaintiff's name. The transfer was then executed by the plaintiff, and was lodged by the corporation, together with the certificate, at the offices of the Smelting & Refining Company of Australia for registration. Whatton, on receiving notice from the company that this transfer had been lodged for registration, replied that the transfer was not in order, and should not be completed, and on March 28 the company informed the plaintiff of Whatton's objection, and intimated to him that the passing of the transfer would be delayed until receipt of further instructions from Whatton. The shares had since greatly fallen in value and were now practically unsalable.

On April 30, 1904, the plaintiff commenced this action against Herts and Whatton, claiming against Herts repayment of the 700*l.* with interest at 10 per cent, and against Whatton a declaration that by virtue of the deposit with the plaintiff of the said transfer and certificate the plaintiff was entitled to a mortgage or charge on the shares for the amount of the loan and interest, with consequential relief.

The plaintiff subsequently amended his statement of claim by alleging that the defendant Whatton was under an implied contract or obligation not to do anything to prevent or delay the registration of a bona fide transferee for value of the shares as owner thereof, and that he had broken such implied contract or obligation, and by adding a claim for damages for the breach of the said contract or obligation.

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Shortly after the commencement of the action Herts was adjudicated a bankrupt and absconded. In August, 1904, the plaintiff paid off the corporation.

[552] The defendant Whatton pleaded that the loan to the plaintiff was made without his authority, and stated in the witness box that the authority given to Herts to obtain a temporary loan for his own purposes was subject to two conditions: First, that he, Whatton, approved the terms upon which the money was to be raised; and, secondly, that Herts first satisfied his (Whatton's) own need.

The action was tried on February 15 and 16, 1905.

Kekewich, J., upon the question whether the plaintiff was entitled to a charge on the shares, held that Whatton must be taken to have authorized the loan to the plaintiff, since he gave the blank transfer and share certificate to Herts and authorized him to raise money on the shares for his own purposes, and did not give notice of any limitation of the authority to any third party. The plaintiff was therefore entitled to a declaration of charge. With regard to the question of damages his Lordship had no doubt that an action might be maintained by a transferee of shares against a transferrer who had put a stop on the registration of the transfer for any loss occasioned by the delay in the registration; but his difficulty was that at the time when the action was brought the plaintiff could not have sold the shares for his own benefit, since he had not then paid off the corporation, and was only their nominee, and was not entitled to be subrogated to the rights of the corporation as against Whatton. Therefore, in his Lordship's opinion, the plaintiff had suffered no damage, and was not entitled to relief on this part of the case, and he dismissed the claim for damages, without costs.

The plaintiff appealed from this judgment in so far as it dismissed the claim for damages.

P. O. Lawrence, K.C., and **T. B. Napier,** for the plaintiff. This appeal is from the dismissal of the plaintiff's claim against Whatton for damages, and the real question is whether the plaintiff can sue him for damages for having stopped the transfer

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of the shares. Our case is that Whatton, having executed a blank transfer of the shares, was, according to the authorities, under an implied obligation not to do anything to stop that [553] transfer from being completed. *London Founders Association* v. *Clarke* (1888) 20 Q. B. D. 576, 582, 57 L. J. Q. B. N. S. 291, 59 L. T. N. S. 93, 36 Week. Rep. 489; *Skinner* v. *City of London Marine Insurance Corporation* (1885) 14 Q. B. D. 882, 887, 54 L. J. Q. B. N. S. 437, 53 L. T. N. S. 191, 33 Week. Rep. 628. Those two cases show the form of order we ask for. It is the breach of that obligation that has caused damage. There is no such difficulty here as arose in *France* v. *Clark* (1884) 26 Ch. D. 257, 53 L. J. Ch. N. S. 585, 50 L. T. N. S. 1, 32 Week. Rep. 466, and *Ex parte Sargent* (1874) L. R. 17 Eq. 273, 43 L. J. Ch. N. S. 425, 22 Week. Rep. 815, for everything was done properly with the knowledge and authority of Herts and Whatton, and Whatton cannot stand in a better position than Herts. A person giving a blank transfer thereby enters into an obligation with any person whose name is properly inserted as transferee; it is a contract by him that anybody lending money on the faith of that transfer shall be given a good and sufficient security; otherwise a blank transfer is of no use at all. Nothing remained to be done here but the purely ministerial act of registration. *Moore* v. *North Western Bank* [1891] 2 Ch. 599, 60 L. J. Ch. N. S. 627, 64 L. T. N. S. 456, 40 Week. Rep. 93.

[**Romer**, L.J., referred to *Re East Wheal Martha Mining Co.* (1863) 33 Beav. 119, where it was held that a company cannot be compelled to register a transfer without the certificate being left with them for inspection.]

We submit that the plaintiff has a good equitable charge for the liability he is under to the Mines Corporation. *Gurney* v. *Seppings* (1846) 2 Phill. Ch. 40, 1 Coop. t. Cott. 12, 15 L. J. Ch. N. S. 385. The implied obligation not to interfere with the completion of the transfer is not confined to the case of a transfer of shares. This is analogous to the ordinary case of selling of chattel and a refusal by the vendor to allow delivery of the chattel. In every contract there is an implied obligation on the part of the contractor to do nothing inconsistent with the con-

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tract; and it does not matter that the contract was entered into through the instrumentality of an agent. If the plaintiff's case is put upon estoppel the same result follows; the estoppel extends to all the legal incidents of the transfer. In the court below it was held that at the date of the writ the plaintiff had no sufficient interest in the shares to entitle him to sue for damages, but, first, the plaintiff had rendered himself personally liable to [**554**] pay the debt to the corporation; secondly, by the receipt of January 14 the shares were either mortgaged to the plaintiff or allocated to the debt; thirdly, Whatton could not have got the shares from the plaintiff until he had either paid the corporation or relieved the plaintiff from his liability. The plaintiff was an equitable mortgagee of the shares although he had parted with the shares to the corporation. There were really two mortgages on the shares,—one from Herts to the plaintiff, the other from the plaintiff to the corporation. Further, the plaintiff, with the assent of the corporation, had the legal right to sue on the transfer. It could not be said that the mortgagor and mortgagee together could not have sued for damages, and if the mortgagor is placed by the mortgagee in the position of having the legal right to sue, there is no ground for holding that he is not entitled to sue. The measure of damages is the difference between the value of the shares at the date when the stop was put upon the registration and their value when the plaintiff could have procured the removal of the stop, *i. e.*, when he obtained a declaration that he was entitled to a charge on the shares. *Sanders* v. *Kentish* (1799) 8 T. R. 162; *Tempest* v. *Kilner* (1846) 3 C. B. 249, 253; *Owen* v. *Routh* (1854) 14 C. B. 327, 2 C. L. R. 365, 23 L. J. C. P. N. S. 105, 18 Jur. 356, 2 Week. Rep. 222.

Stewart-Smith, K.C., and **Cozens-Hardy**, for the defendant Whatton. The plaintiff's rights against Whatton arise by estoppel only. The obligation on the vendor upon a sale of shares to do nothing to prevent registration attaches, not to the transfer itself, but to the antecedent contract for sale. *Skinner* v. *City of London Marine Insurance Corporation* (1885) 14 Q. B. D. 882, 887, 54 L. J. Q. B. N. S. 437, 53 L. T. N. S. 191, 33 Week. Rep. 628. The transfer merely carries out the contract. There is no implied warranty in a transfer.

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[**Cozens-Hardy**, L.J.: You are derogating from your grant. There was an antecedent contract for value, and you cannot now say that the plaintiff had not a valid mortgage.]

Whatton is estopped from saying that the transfer does not vest the shares in the plaintiff as security, but there is here no antecedent contract between Whatton and the plaintiff from which it is possible to infer an agreement on the part of Whatton [**555**] not to delay the registration. Therefore, the action must fail so far as it is based on breach of contract. Except by estoppel Herts could not confer on the plaintiff any better title than he had himself, and he could only bind Whatton to the extent of his authority. There is here no privity of contract between the plaintiff and Whatton. If the plaintiff were a beneficial transferee, his right to damages could not be contested, but at the date of the writ he was a mere nominee for the corporation, and was not a transferee in his own right, and at that date neither he nor the corporation had suffered any damage.

[**Romer**, L.J.: I cannot agree that the plaintiff had no beneficial interest in the shares at the date of the writ.]

He could not deal with the shares until he had paid off the bank.

P. O. Lawrence, K.C., in reply.

Collins, M.R.: This is an appeal from a decision of Kekewich, J., upon one point. The plaintiff claimed a declaration that by virtue of the deposit with the plaintiff of a transfer in blank signed by the defendant Whatton of 1,467 shares of a certain company then standing in the name of that defendant in the books of the company, and of the certificate of such shares by the defendant Herts under the authority of the defendant Whatton, the plaintiff was entitled to a mortgage or charge on such shares for 700*l.* and interest. The learned judge made the declaration in the terms asked for by the plaintiff. Herts dropped out of this discussion at an early stage, and we have only to deal with Whatton. The shares in question are now of little or no value, and therefore the declaration was not of any great pecuniary advantage to the plaintiff. But the plaintiff had also introduced by amendment a claim for damages for breach of

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the implied contract or obligation by the defendant Whatton not to do anything to prevent or delay the registration of a bona fide purchaser for value of the shares referred to. The learned judge, having found in favor of the plaintiff upon the claim for a declaration of charge, felt a difficulty in allowing the claim for damages, and in point of fact he held that there was an obligation on the part of the defendant to the plaintiff and a breach of that obligation, but that in the circumstances the [**556**] plaintiff was in such a position that he could not prove that he had sustained any damage by virtue of the breach. It is upon that point that the appeal comes before us. The decision of the learned judge has narrowed the points in controversy before us very much; it has cut away (because the defendants are not appealing here) a point that might have been raised as to the invalidity of the transfer by the defendant Whatton to the plaintiff Hooper. Shortly stated, the circumstances were as follows: Herts was a person engaged in financial operations. Whatton, the defendant, was a clergyman, who appears also to have embarked in some speculative transactions; at all events, the relations between him and Herts appear to have been intimate, and the learned judge found that Whatton was in the hands of Herts to a great extent. Whatton was possessed of the shares in question, and he was desirous of raising money upon them. He had been, apparently, joint adventurer with Herts in some former transactions, and Herts also was in need of money, and there seems to be no doubt upon the evidence that Whatton was willing that Herts should use the shares belonging to Whatton as a security for a temporary loan to be raised by Herts for his own purposes. I think he was also desirous, but at a later date, of raising money himself upon them. Now, the machinery which he adopted to bring about this result was that he put into the hands of Herts a blank transfer of 1,467 preference shares in the company named, and he also handed him his certificate of those shares for the purpose of enabling him to raise this temporary loan. Herts then went to Hooper, and obtained from Hooper, on the security of this transfer and the certificate, one or two advances of comparatively small amounts; but more money was wanted, and Herts took steps to induce Hooper to raise it from a bank called

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the Mines & Banking Corporation. Herts might have had considerable difficulty in raising the money himself. Accordingly, Hooper, armed with the transfer and the certificates, put himself into communication with the bank, and they found him 700*l.* upon the deposit of those securities with them.

The result of that transaction, as between Herts and Whatton, appears to have been that Whatton had put himself in such a [557] position that he could not impugn the title of Hooper or of the bank from whom Hooper had got the advance to deal with the transfer in the way they did deal with it; and the way in which they dealt with it was as follows: Herts not returning the money, as he, of course, undertook to do, the bank naturally began to press for payment. Hooper was responsible to them for the money that they had advanced, and they had the security of the transfer and the certificate which he had handed to them; and Hooper had a charge upon them to the extent of his own liability. In this state of things the bank, with the concurrence of Hooper, filled in Hooper's name in the transfer, so as to make it a transfer from Whatton to Hooper. The bank and Hooper were acting together, and the transfer was filled in in this way for the common purpose, as it seems to me, of realizing all that could be got out of the securities. The bank then applied in ordinary course to the company to register the transfer, and then comes the act on the part of the defendant Whatton which gives rise to the suggested cause of action which is the matter in controversy on this appeal. On March 26, 1904, Whatton, instead of assisting in carrying out the transfer, which he was estopped from denying, wrote to the company putting a stop to the registration, with the result that the shares could not be registered, and any attempt on the part of Hooper or of the bank to realize the security was suspended, and it was not until the date of the judgment in the action in February, 1905, that the stop was taken off. In the meantime the shares had depreciated in value so much that it is very doubtful whether they have any value at all at the present moment.

It is said that they had some considerable value at the time when the stop was put on; and the question is now whether under these circumstances Hooper has any right of action against

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Whatton. That depends upon the question whether a registered holder of shares who has transferred the shares, I will assume for value, is under an obligation not to do anything to hinder his transferee from getting the full benefit of the transfer. Upon this question there is a passage in the judgment of Lord Esher, M.R., in *London Founders Association* v. *Clarke* (1888) 20 Q. B. D. 576, [558] which is in point, but before reading that passage I will state the facts of that case from the headnote: "A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the stock exchange. In accordance with the practice of the stock exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use." The court held "that the contract for the sale of shares on the stock exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable." The contention of the plaintiffs in that case was that the price was recoverable on the ground of a total failure of consideration. Lord Esher, after expressing his opinion that it was impossible to accede to that contention without contravening what was said by the Court of Exchequer Chamber in *Stray* v. *Russell* (1860) 1 El. & El. 916, 29 L. J. Q. B. N. S. 115, 6 Jur. N. S. 168, 1 L. T. N. S. 443, 8 Week. Rep. 240, said this (1888) 20 Q. B. D. 582: "I have no doubt that the seller must not prevent or do anything to prevent the company from accepting the purchaser or his nominee. What the remedy would be, if he did, it is unnecessary now to consider. There is nothing here to show that the seller in this case did anything of the kind." Again, later on he says: "The purchaser takes that risk on himself" (that is, the risk of the company approving the transfer), "and the seller's liability is satisfied by hand-

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ing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser."

The learned judge in the court below had no doubt whatever upon that part of the case. He thought that an obligation had arisen upon Whatton not to interfere with the lawful result of anything done under the authority of that transfer; and [559] therefore the only question in his mind was whether, there being a breach of that obligation on the part of Whatton by intervening and stopping the registration of these shares, the plaintiff was in a position to claim damages. Before us the point has been raised, and insisted upon, that there is no such obligation as that acted upon by Kekewich, J., to the extent I have named, and asserted as existing by Lord Esher. That point has been argued before us by counsel for the respondent, and they also rely strongly on the other point, which Kekewich, J., decided in their favor, that the plaintiff is not in a position to claim damages.

Now, to take the first point first, it seems to me quite clear, and for the reasons given by Lord Esher, that there does arise out of the relation constituted between the parties by the transfer an obligation or a duty that the grantor shall do nothing to interfere with the grantee getting the benefit of his grant. That, it seems to me, is the principle asserted,—that there is an obligation arising out of the relation of the parties. It is not one which is in express terms contracted for between the parties, and it is not to be found in express terms in the transfer itself. The transfer itself contains the grant by which the relation between the parties of grantor and grantee is created, and that carries with it an obligation, as it seems to me, on the part of the grantor, not to interfere with the full fruition by the grantee of what the grantor has purported to give him under the grant. That seems to me enough to establish the obligation, and the breach of it is not denied.

We now come to the question of damages: Aye or no, Is the plaintiff in this case entitled to claim damages? My first answer to that is, Why not? Here is a legal transferee suing a legal transferrer for an admitted breach of a personal obliga-

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tion. Prima facie there is a clear right in a legal transferee who is entitled to the performance of a particular obligation to have damages paid to him measured by the loss which he in his legal position as owner can be fairly said to have suffered by reason of the breach of that obligation. Now, why is he not entitled to have damages? The suggestion made is that his right in this case was not a beneficial right in himself; [560] but that contention must go thus far to be of any use at all, that he was a mere nominee of the bank, and therefore has no right of action in himself at all—that he is merely their *prête-nom;* that in order to see whether there is a right to damages it must be assumed that the real parties to the action are those for whom he is the nominee; and that inasmuch as the bank, who have lent this money, have got the security of a solvent person, namely, Hooper, they cannot complain that they have suffered anything by the interference by the defendant with the complete fruition of the shares comprised in the transfer. The argument comes to this, that since Hooper can and will pay them, they cannot sue, and though Hooper must and will pay them, he cannot sue either. It seems to me that is to shut one's eyes to the common sense of the matter in endeavoring to appreciate a very subtle equitable distinction.

I think we are entitled here to look broadly at the facts. It is not the case of Hooper putting in suit his rights against the rights of the bank; on the contrary, he and the bank are acting together in this matter for the common purpose of realizing their security to the best advantage, having regard to their relations. Undoubtedly, as between the lenders, the bank and Hooper, the value of that security would come in in reduction of the obligation of Hooper to the bank, and the person primarily interested (since he was the person who would ultimately have to pay on any hypothesis) in introducing the value of that security into the discussion was Hooper. If those shares could be realized, the realization would enure ultimately for the benefit of Hooper, because it would reduce his obligation to the bank, if the bank took the security. If, on the other hand, he paid off the bank, then he would apply the security in mitigation so far as it would go of his own damages. Applying to this

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case the ordinary standards by which damages are measured at common law, and treating it as a case in which the damages were being assessed by a jury, it would be the duty of the judge to tell the jury that they must look at the matter reasonably, and say what, as reasonable men, they would expect to be the damages which would be suffered by a person in Hooper's position under these circumstances. A [**561**] jury are not bound to ascertain absolutely and with mathematical nicety the precise amount of damage sustained, but looking at the reasonable probabilities of the case they must compensate the plaintiff as far as they can for the loss which, in their view, having regard to all the circumstances of the transaction, he has suffered arising naturally out of the breach for which the defendant is responsible. In this case the act of the defendant has deprived the persons entitled thereto of the benefit accruing from the right to deal with the shares at the time when the defendant entered into his obligation. If that right existed Hooper was the person in law, as between him and the defendant, who was entitled to the benefit of it. It might be enough as against Whatton to say: "You are the transferrer in this matter, and you cannot as against your transferee set up these nice considerations, or go behind the real transaction." But if we do go behind the transaction we must not take leave of our common sense; and if we find that taking all the equities into consideration the net result of the matter is that the bank are not sufferers only, because they get paid by Hooper, then, if they get paid by Hooper, why should not Hooper get the benefit to which he was entitled from the transferrer? It seems to me that the person who really suffers from the action of Whatton, namely, Hooper, is the person who is entitled to receive the damages from him. Therefore I am unable to take the view which the learned judge has taken upon this point, and I think that his mistake was in treating Hooper as a person who was merely, as Mr. Cozens-Hardy in his short and perfectly logical argument suggested, a person with no beneficial interest. But the real point in this case is that Hooper was not a mere nominee, but was the person beneficially interested in the realization of the security. If he had been, as Mr. Cozens-Hardy very ingeniously argued, a mere abstraction X,

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merely lending his name for the purposes of the writ, then I should have accepted Mr. Cozens-Hardy's position; but Romer, L.J., during the argument declined to take the first step, and I do not feel any more inclined to take it than he did. The result is that there is a right to damages measured by the loss to Hooper. What is the loss to Hooper? Hooper lost [562] what he might have got by realizing the security at the time of the breach. That does not seem to me to involve that he must be taken as bound to force the whole of those shares on the market at one and the same time. I think, if the matter were before a jury, they would be asked to estimate, as reasonable men, what a person anxious to realize the security to the best advantage, not taking an undue time about it, but dealing with it prudently, would have got for the shares—what would have been the value of the shares realized to the best advantage, having regard to the nature of the shares, the state of the market, and the possible depreciation of the shares by waiting an undue time, and the loss to Hooper is measured by the difference between the value of the shares at the time when he ultimately got the dominion of them and their value supposing he had had the opportunity of realizing them in the manner I have suggested. That will be the standard, and that will have to be ascertained by the Master. It is not a case of a given sale on a particular day. The Master will have to consider all the circumstances, the amount of shares to be disposed of, and the prices, so far as he can ascertain them, ruling at the time. The appeal must be allowed, and there must be the inquiry I have suggested.

Romer, L.J.: I am of the same opinion. The learned judge in the court below has found—and there is no appeal from that part of his judgment—that the transferrer of the shares, Whatton, must be held to have authorized what was in fact done in this case with regard to the shares, *viz.*, the charge in Hooper's favor, the subsequent mortgage of the shares by Hooper to the Mines & Banking Corporation, and the filling in in the blank transfer executed by Whatton of the name of Hooper as transferee. That being so, as between Whatton and Hooper, Whatton is in the

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position of a transferrer to Hooper, and it is to be noticed that Hooper has a direct interest in the shares, not only as nominee of the Mines & Banking Corporation, but in his own right as equitable mortgagee before the mortgage to the corporation, and because of his position as mortgagor to the corporation. When for the purposes of the corporation, or of [563] the corporation and Hooper, Hooper's name was put in as transferee of these shares, it appears to me impossible to say that Hooper in regard to that position is to be considered as having no interest whatever in the shares except as a mere nominee for the corporation. I think on the facts he must be taken to have been put in as nominee, because he also occupied the position of mortgagor and had otherwise an interest in these shares. Therefore, it appears to me that the defendant Whatton cannot say as against Hooper that the latter as transferee has no interest of his own in these shares.

It is not necessary to decide the point, but I should like to point out that I am not at all sure that any difference would arise in this case if Hooper's name had not been put in as transferee and a third name had been put in. I am not at all sure that even in that case it could not be said on behalf of Hooper and of the corporation that the name of that third person had been used for the purposes of both. But I need not consider that in this case. It is sufficient to say here that, to my mind, it is established that Whatton is the transferrer of these shares to Hooper, and that Hooper has acquired the position of transferee for valuable consideration.

Under these circumstances, I have no doubt that there is an implied duty or obligation, as between Whatton and Hooper, that Whatton will do nothing to prevent Hooper being put on the register of shares so as to acquire the full benefit to be derived from the transfer. What happened was this. An application was made to the Smelting & Refining Company of Australia to register Hooper's name as transferee. At the date of that application there was no dispute of any kind between the corporation and Hooper,—in fact, there never has been any dispute between those two in this matter. They have always acted amicably, their interests being practically identical. That applica-

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tion having been sent in, registration, but for the conduct of Whatton which I am about to refer to, would have followed in due course, and that registration, as I need scarcely point out, would have enured for the benefit of Hooper and of his mortgagees, the corporation. What happened then was this. Whatton gave notice to the company the shares of which were [564] the subject of the transfer not to recognize the transfer, representing, in fact, that the transfer was not valid as against him. To my mind, that was a clear breach of the duty or obligation he owed to Hooper. The result of that breach of duty was that the shares were not registered. Who suffered from that? Hooper certainly suffered from it. He, the transferee, whose name ought to have been put on the register, by this breach of duty towards him on Whatton's part, failed to get on the register. By reason of that breach of duty Hooper, as representing himself and his mortgagees, failed to get any benefit from the transfer until the judgment in this action, when his right to have the transfer perfected by registration was decided against Whatton. To my mind, it is clear that damage has been caused by the delay which has arisen by reason of Whatton's breach of duty towards Hooper, for it is admitted that between the date when this transfer ought to have been registered, and when, if the registration had been proceeded with, Hooper, as representing himself and his mortgagees, could have obtained the full benefit of these shares, and the time when he ultimately succeeded in getting a decision in his favor upon this point, there was a falling off in the value of the shares. To my mind, the damage caused by that delay is the difference between those two values. I really can add nothing to what the Master of the Rolls has said as to how that damage ought to be estimated. In estimating the value of those shares at the time when registration ought to have been effected the Master must try to ascertain the value in a reasonable way. Of course, amongst other considerations he would bear in mind that the large number of shares involved in this transfer was such that probably they could not have been sold on the market in one block, but must have been disposed of by degrees. That and all other material considerations bearing upon the question, I should hope with-

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out any special directions from us, will be taken into consideration by the Master.

With regard to the proceedings by Hooper, Hooper, to my mind, when he started this action, must be held to have made his claim for damages for delay on behalf of his mortgagees, assuming that they had suffered any damage, as well as on his [**565**] own behalf; but in the events which have happened, seeing that pending the trial he has paid off those mortgagees, it follows that the full amount of the damages which will be found as the result of the inquiry before the Master must be paid to him. The judgment of Kekewich, J., will be varied as follows: Discharge so much of the judgment as dismisses the claim for damages and in lieu thereof direct an inquiry as to damages, reserving the costs of the inquiry. Order the respondent to pay so much of the costs of the action as related to the claim for damages and the costs of the appeal.

Cozens-Hardy, L.J.: I am of the same opinion, and I have nothing to add.

Solicitors: *G. L. Matthews & Company; Thorp & Saunders.*

Note.—Duty of transferrer of shares of stock not to prevent or delay registration on corporate books.

The question involved in HOOPER v. HERTS is one upon which there is but little direct authority.

A very similar situation was presented in *Greenleaf* v. *Ludington* (1862) 15 Wis. 558, 82 Am. Dec. 698. There the owner of stock in a railroad company represented to it that he had lost sundry certificates of its stock, and among them one for ten shares, numbered either 285, 295, or 317, he could not say which. He therefore requested the company not to transfer on its books the stock referred to, but to issue to him new certificates of stock in lieu thereof, which was done upon his giving the company a bond to save the company harmless. Shortly afterwards, holders of the original certificates 295 and 317 presented them to the company for exchange or transfer, and the company, being satisfied that they had never been lost by the former holder, received them as valid. More than a year thereafter, the plaintiff purchased the original certificate number 285, which he presented to the proper officers of the company

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with the indorsement of the stockholder upon it, and requested its transfer to him on the company's stock book, which the company, on account of the said representations, request, and bond of the stockholder, refused to permit. The plaintiff thereupon called upon the stockholder, stated the facts to him, showed him the certificate, and requested him to countermand his request to the company, and to remove the obstacles to the recognition and transfer of the stock, which he then promised to do, but never did. At the time the plaintiff demanded the transfer of the stock, it had some market value, but before the commencement of the action had become worthless. It was held that the refusal of the company to transfer upon its books the plaintiff's certificate of stock was a tort for which the plaintiff was entitled to maintain an action in the nature of an action on the case against the company and against the original stockholder, he being a party to the tort and primarily responsible to the plaintiff for the damages sustained.

In *Thornton* v. *Martin* (1902) 116 Ga. 115, 42 S. E. 348, it was held that the purchaser of shares of stock in a corporation may, where the vendor and the agents of the company refuse to recognize the validity of the sale or to allow a transfer on the books of the company, bring an equitable proceeding against the vendor and the company to restrain the former from disposing of the stock or of interfering with its transfer, and to compel the company to make the transfer and receive the purchaser as a shareholder.

So, also, in *Scherck* v. *Montgomery* (1903) 81 Misc. 426, 33 So. 507, it was held that the purchaser of stock, no certificate for which had yet been issued, was entitled to a mandatory injunction to compel the issuance of the stock, with his vendor, who had instructed the corporation not to issue the stock, as a party, in order that his objection might be heard and adjudicated.

In *London Founders' Asso.* v. *Clarke* (1888) 20 Q. B. D. 576, 57 L. J. Q. B. N. S. 291, 59 L. T. N. S. 93, 36 Week. Rep. 489, there is a *dictum* by Lord Esher to the effect that the seller of corporate stock must not prevent, or do anything to prevent, the company from accepting the purchaser or his nominee as a shareholder.

In *Boultbee* v. *Wills* (1907) 15 Ont. L. Rep. 227, where the seller of shares obtained an injunction order, which by inadvertence was given such a broad operation as to restrain the transfer agents from registering a transfer to the plaintiff of the shares which he had purchased, it was said to be clear upon principle, as well as upon the authority of HOOPER v. HERTS, that a vendor of shares is under obligation to do nothing to prevent his purchaser having the shares registered in his name.

There is, however, no active duty on the part of the vendor to procure registration of the transfer of the shares, a failure to per-

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form which will entitle the vendee to rescind, but it is the duty of the transferee to obtain the corporation's recognition of himself as a shareholder. See, *inter alia, Stray* v. *Russell* (1859) 1 El. & El. 888, 29 L. J. Q. B. N. S. 115, 6 Jur. N. S. 168, 1 L. T. N. S. 443, 8 Week. Rep. 240; *Skinner* v. *City of London M. Ins. Corp.* (1885) 14 Q. B. D. 882, 54 L. J. Q. B. N. S. 437, 53 L. T. N. S. 191, 33 Week. Rep. 628; *London Founders' Asso.* v. *Clarke*, and *Boultbee* v. *Wills, supra; Castleman* v. *Waghorn, G. & Co.* (1908) 13 B. C. 351.

As to the right of a corporation to refuse to transfer stock on its books because of objections of former holder, see note in 27 L.R.A. (N.S.) 200. E. S. O.

[SUPREME COURT OF CANADA.]

GRAND TRUNK RAILWAY COMPANY OF CANADA, *Defendant (Appellant)*, and SIMON JAMES (*Plaintiff*) *Respondent.*

31 Canada S. C. 420.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company — Fencing — Culvert — Negligence — Cattle on highway — 51 Vict. chap. 29, § 194; 53 Vict. chap. 28, § 2.

A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a water course, and where cattle went through the culvert into a field, and from thence to the highway, and straying onto the railway track were killed, the company was not liable to their owner. Taschereau, J., dissenting.

(October 29, 1901.)

Present: Sir Henry Strong, Ch., J., and Taschereau, Gwynne, Sedgewick, and Girouard, JJ.

APPEAL from a decision of the Court of Appeal for Ontario, 1 Ont. L. Rep. 127, affirming the judgment of Street, J., at the trial, 31 Ont. Rep. 672, in favor of the plaintiff.

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[421] The question to be decided on this appeal is stated in the above headnote. The facts are set out in the judgment of Mr. Justice Gwynne.

Nesbitt, K.C., and **H. S. Osler**, for the appellant.

Teetzel, K.C., and **Thompson**, for the respondent.

The Chief Justice: I concur in the judgment of Mr. Justice Sedgewick.

Taschereau, J.: I would dismiss this appeal. The respondent's horses, it is clear, got upon the railway line because it was not fenced, as required by the statute. The reasoning of the Court of Appeal seems to be unassailable.

Gwynne, J.: The railway of the defendant crosses a farm of one Burns, in the township of Saltfleet, in the county of Wentworth, in the province of Ontario, through which, in a low place about 15 feet below the upper surface of the farm, a natural stream runs, which, during the spring and autumn freshets, flows in a great volume and with considerable force insomuch that during their continuance no animal can pass along the bed of the stream from one side of the railway to the other, but in the summer season the water is low and then animals can pass along the bed of the stream from one field to another. The defendants in constructing their railway across the farm made their railway over the stream by a stone arch on a level with the general surface of the upper lands, the top of the arch being from 12 to 15 feet above the bed of the stream. They also constructed and have maintained fences on either side of their railway, terminating at the walls of the arch across the stream so that no animal in a field on either side of the railway can get on to the railway at any place direct from [422] such field. The whole of the space under the arch constitutes the bed of the stream, and in point of fact no use whatever is made of such space by the defendants.

The plaintiff is the owner of horses which he had placed at pasture with Burns, the owner of the farm. The evidence is that two of the plaintiff's horses passed from the field belonging to Burns, on the south side of the railway, along the bed of the stream into the field on the other side. How long they re-

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mained there does not appear, but it does appear that they escaped from that field through a fence bordering on a highway, by reason of the insufficiency of such fence and of the negligence of Burns or his servants in not keeping that fence in an efficient condition, and that they thence proceeded along the highway to a point where it is crossed on the level by the defendants' railway, from which point, crossing the cattle guards maintained by the defendants there, they got on to the railway track, and at some distance from the highway crossing were killed by a passing train. In an action by the plaintiff to recover the value of the horses so killed it clearly appears that the horses got on to the railway track from the highway by reason of the inefficiency of the cattle guards maintained by the defendants there, but the defendants rest for their defense upon this, that the horses of the plaintiff which were killed were, as the defendants contend, contrary to the provisions of § 271 of the railway act, 51 Vict. chap. 29, at large upon the highway which is crossed on the level by the defendants' railway, and that, being so at large, they reached the place where the highway is crossed by the railway, and that although they get on to the railway outside of the line of the highway by reason of the insufficiency of the cattle guards maintained [**423**] by the defendants there, and were killed by a train of the defendants, nevertheless the plaintiff is disentitled to recover for the value of the horses.

The plaintiff, on the contrary, contended, and his contention has been maintained by the courts in the province of Ontario, that by the § 194 of 51 Vict. chap. 29, as amended by 53 Vict. chap. 28, it was the duty of the defendants to have fenced across the stream on either side of the railway, and to have so prevented all possibility of animals crossing along the bed of the stream under the railway, and that, having neglected so to do, they cannot appeal to the fact of the horses having got on to the railway by reason of the insufficiency of the fence separating Burns's farm from the highway, nor insist that the horses were wrongfully on the highway.

The contention of the defendants, on the contrary, was that their fences as constructed were in perfect conformity with the provisions of the statute, as they were sufficient to prevent any

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cattle from getting directly from either of the fields of Burns onto the railway, and that this was the object and intent of the § 194, which imposed on the defendants the obligation of fencing on either side of the railway, and they contended, further, that even assuming their obligation to fence on either side of the railway to have required them to fence across the stream in question, they were nevertheless entitled to insist, as they did, that their omission to do so was not, under the circumstances appearing in evidence, a matter of which the plaintiff could avail himself in support of the present action; for that it was clearly established that the negligence of Burns in not maintaining a sufficient fence alongside of the highway was the cause of the horses getting onto the highway, and so that they were on the highway [**424**] at large wrongfully within the meaning of the § 271.

The contention of the plaintiff was maintained upon the authority of *Sneesby* v. *The Lancashire and Yorkshire Railway Company* (1875) 1 Q. B. D. 42, 45 L. J. Q. B. N. S. 1, 33 L. T. N. S. 372, 24 Week. Rep. 99. In that case the negligence of the defendants' servants had caused a drove of cattle which were being driven along a road crossed by the defendants' railway to become so infuriated that they rushed furiously away from the control of the drover and in the course taken by them in their terror they got into a garden or orchard close to the railway, and in their fury broke down a fence separating the garden from the railway, upon which some were found killed at the distance of about a quarter of a mile from the road where they had been terrified by the negligent conduct of the defendants; and it was held that as the defendants had been guilty of negligence which caused the drover to lose control over the cattle, and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened, and that consequently the damages were not too remote.

Between that case and the present there is no parallel; there the injury suffered by the cattle was the direct consequence of the act of negligence committed by the defendants, which consisted in this, that there was a steep incline from the level of

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the railway to the level of the road, and while the cattle were proceeding along the road, across the railway track, several trucks were, by the negligence of the defendants' servants, allowed to run down between the cattle and the persons in charge of them, and so separated the cattle from the persons in charge of them. There the defendants were held to be liable because the injury complained of followed directly in continuous sequence [425] from the wrongful act of the defendants' servants. In the present case the omission to fence across the stream, assuming it to constitute default in the discharge of the duty imposed upon the defendants, did no injury to the plaintiff. His horses remained in the possession of and under the care of Burns, when in the field to which they removed by passing under the railway on the bed of the stream, equally as they had been before. Between the omission to fence across the stream and the defect in Burns's fence alongside of the highway there is no connection whatever; none of cause and effect as there was in *Sneesby* v. *The Lancanshire and Yorkshire Railway Company, supra.* The present case, therefore, cannot be rested upon the judgment in that case, nor are the defendants estopped, by reason of anything appearing in evidence, from insisting that the cause of the horses getting on to the highway was the defect of Burns's fence, or from claiming the benefit of the said § 271.

That section which has been in force in virtue of (and without alteration since the passing of) the act 20 Vict. chap. 12, § 16, enacts that:

"Sec. 271. No horses, sheep, swine, or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level unless such cattle are in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection."

By an unbroken series of decisions of the courts of Ontario and of that portion of the late province of Canada constituting Upper Canada, from 1858 to the present time, it has been held that the mere fact of an animal being on a highway within the prescribed distance from a railway crossing without being in charge of some person, as required by the statute apart from all

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consideration of how it got there, constitutes being [426] at large within the meaning of the statute, and that the statute takes away the right of action not only where an animal so at large is killed or injured at the very point of intersection of the railway with the highway, but also in case of its being killed or injured on the railway outside of the limits of the highway, to which place it had gotten by reason of the insufficiency of the cattle guards of the defendants at the crossing. This ruling has been invariably maintained, and, although the statute in which the section originally appeared has since then been amended by the legislature, no alteration has been made in this section.

The general rule so laid down is, however, I apprehend, like all general rules, subject to some exception, as, for example, in case an animal should inadvertently escape from an inclosure in which it was kept, and a person in charge should immediately go in search of it, or that an animal being led by a person on foot on a highway should escape from him and run away from the control of the person leading it, and that such person should immediately follow in pursuit of it, but that in these cases the person in search of the one, or in pursuit of the other, should only succeed so far as to get up in time to see the animal cross from the highway on to the railway outside of the limits of the highway, by reason of the insufficiency of the cattle guards of the railway; and that the animal should be killed or injured before the person following it could interpose and drive it away, —it would seem hard if in such a case the railway company should be held to be irresponsible for a loss so occasioned by the insufficiency of the cattle guards which they are required by statute to maintain.

However, the present case is not one of that nature, but is of the class which is governed by an uninterrupted [427] series of decisions extending over a period of forty-three years, which I do not think should now be departed from, especially in a case in which the plaintiff rests upon quite a different ground, and has not called in question the correctness of these decisions.

As to the other point I am of opinion that the erection of fences on either side of the railway, terminating at the walls of the arch constructed over the stream, as was done in the present

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case, constituted complete fulfilment of the obligation imposed by the statute on the appellants.

The appeal must therefore be allowed.

Sedgewick, J.: The defendant company's line of railway between Hamilton and Niagara Falls crosses the farm of two brothers named Burns, in the township of Saltfleet, Wentworth county, Ontario.

Through the farm and substantially at right angles to the railway track runs a wide natural water course with high banks on either side, which water course the railway crosses by means of two culverts or bridges, each 20 feet in width and 15 feet in height. For the most part during the year the stream is so filled with water as to prevent animals from fording it or passing under the culverts, but sometimes in the autumn it is dry enough for this purpose. That was the case in September, 1899, when the accident happened which is the foundation of the present action.

On the south side of the track there is a pasture, and upon the north side a field used for pasture after the spring crops are taken off. The plaintiff, by agreement with the owners of the land, was pasturing a number of horses on the lower field. At the time in question the stream under the culverts between the two fields having become so small or shallow, the horses in the lower field were enable to pass up [**428**] stream to the upper field. That field had all summer been surrounded by fencing erected on three sides by the proprietors, the fourth side being the fencing and bridging of the railway, but through the negligence or mistake of some one unknown, a panel on the northern fence separating the field from a highway had been left open, and the plaintiff's horses, escaping through the opening to this highway, which crosses the railway track at right angles and on the level a short distance therefrom, wandered upon the roadbed of the railway. Two were struck by a train passing westward and were killed. There was some question raised at the trial as to whether the cattle guards on each side of the highway crossing were in proper condition, but I will deal with this later on.

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There is no complaint as to the condition of the fences on each side of the railway track; they were in perfect repair. The company had not, however, maintained a fence across the water course running under the culverts, although about ten years before it had by request made some sort of a barricade under one of the culverts where the water was dry. The fences, however, on each side of the track were firmly attached to the perpendicular walls of the culverts, and there was no possibility, as things stood at the time of the accident, for cattle in any way to obtain access to the roadbed or railway tracks, except by means of the highway some distance from the stream. The respondent contends that the company were bound not only to maintain fences in such a way as to prevent cattle from straying upon its tracks, but were equally bound to erect such fences or other structures, and adopt such other measures, as would prevent them from going under the track through the culverts from one side of the railway property to the other.

[429] The trial judge, Street, J., decided in favor of this contention, and that view was upheld by the Court of Appeal.

It is elementary to say that a railway company is under no common-law liability to build such fences as are claimed here. The burden imposed upon it in that regard is wholly legislative, and to place liability upon it the case must be brought within the four corners of a statute. The statute upon which the defendant's liability is here claimed is the railway act of 1888 (51 Vict. chap. 29, § 194) as amended by the act of 1890 (53 Vict. chap. 28, § 2). I cite some of the sections relied upon.

"Section 194. When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway.

"Subsection 3 (as amended by the act of 1890). If the com-

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pany omits to erect and complete as aforesaid any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines, and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

"Section 271 of the railway act, which also affects the case, is as follows:

"Sec. 271. No horses, sheep, swine, or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in [430] charge of some person or persons to prevent their loitering or stopping on such highway at such intersection.

. . . . . .

"3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured."

The plaintiff, as I have said, contends that under this legislation the railway company is bound to erect and maintain a fence on each side of the culvert across the water course, and upon the dividing line between the railway property and that of the adjacent owners.

The company, on the other hand, asserts that it is not bound to maintain fences across water courses at all, or to build them on the boundary line, but that so long as it erects and maintains fencing sufficient in character to fulfil the statutory condition and which prevents cattle from straying upon the railway tracks, it has wholly fulfilled its statutory obligation.

According to my view the company's contention is the correct one.

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The court below, in order to support the plaintiff's view, had recourse to the interpretation clause in the railway act, § 2 (q.), which provides that the expression "railway" means any railway which the company has authority to construct and operate, and includes all stations, depots, wharves, property, and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act, and they hold that the word "railway" in § 194 (fifth line) is therefore equivalent to railway property, and that it thus becomes obligatory on the railway company to erect its fences on the dividing line between its land and that of the adjacent proprietor. In other words, that the section, in fact, calls for a division, line, or boundary fences. Is this the proper construction? [431] There is sufficient, I think, in the section itself to show that it is not. Its object seems to me clear and express; namely, the securing of protection for adjoining proprietors. If Parliament had intended to insist upon the erection of and maintenance of boundary fences, it would have said so.

On the contrary, the phrase of the section leads to the inference that a boundary fence was not intended, but only a fence on each side of the track, of the height and strength of a line fence.

Again, in the proviso at the end of subsection 1 of § 194, there is an indication that the object is to protect, not the railway, but the owners of improved and occupied lands on each side of it. So long as such protection is afforded by a fence of the prescribed character there is no liability.

Again, by the same subsection, provision is made for cattle guards at highway crossings, and the only kind of cattle guard required is one suitable and sufficient to prevent cattle from going on the railway, another clear indication that the object of the section was the prevention of injury to the property of the adjacent owner.

Subsection 3 strongly indicates the same motive. The only penalty for breach of the requirements in regard to fences and cattle guards is that, in the event of the company's neglect, the company shall be liable to the owner, not for all damage which may happen to him or to his property, but only for the damage

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which he may suffer on account of animals killed or injured by the company's trains or engines.

If it was the duty of the company to erect its fences on the exact limit of its "right of way," there would, I think, be a clear indication of such intention, and there would have been some penalty imposed for failure to perform such duty. All this, it seems to me, [**432**] goes to show that the intention of the legislature was not in any way to provide for the safety of the company's property or the company's servants, or for the delimitation of the respective lands of the company and the adjacent proprietor, but solely for the latter's protection in so far as the animals claimed by him or under him might be damaged through lack of the statutory requirements.

It seems to me that it is not necessary to look at the interpretation clause to ascertain the meaning of the word "railway" here. When it uses that word the presumption is that it uses it in its primary, ordinary sense. Everyone knows what the word "railway" ordinarily means ("a way on which a train passes by means of rails," a learned English judge described it in 1883; *Doughty* v. *Firbank,* 10 Q. B. D. 358, 52 L. J. Q. B. N. S. 480, 48 L. T. N. S. 530, 48 J. P. 55; and it must receive that meaning unless there is some all-powerful necessity compelling a departure from it and justifying the addition of one or more or all the entities also specified. Besides, if the rules of interpretation compel us here to add the word "property," converting the substantive "railway" into an adjective qualifying the word "property," are we not equally bound to add all its neighboring words, and to conclude that the obligation of fencing extends to stations, depots, wharves, bridges, and all other structures the building of which is within the company's powers.

To enlarge; if the plaintiff's contention is the correct one, all the company's property wheresoever situate, whether there is a railway track on it or not, and irrespective of the purposes for which it may be used, must be fenced. This burden will cover the depots and station houses, freight sheds, and all other erections upon its lands no matter how inconvenient or detrimental to the public such fencing may be. It [**433**] will cover its mag-

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nificent Victoria Bridge and all bridges across streams and lakes, whether navigable or not navigable as well. What has generally been supposed to be the paramount right of a shipowner, the right of navigation through navigable waters, must give way, as well as those rights over floatable streams which, in Ontario at least, have been secured to the public by other statutes. Tunnels, too, must come within the operation of the rule, as well as those enormous structures of masonry high above the adjacent houses, which one sees in large cities both in the old world and the new, upon the crown of which the railway tracks are laid and the railway operations carried on.

I say the railway act cannot be construed so as to give color to a demand involving such a useless and insensate expenditure. The true view as to the use to be made of the interpretation clauses is, I think, well stated in Hardcastle, Statutory Law (2d ed.) at page 236, as follows:

"An interpretation clause . . . is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of the term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if the word is used more than once in the act, it is on each occasion used in the extended meaning, and it may always be a matter of argument whether or not the interpretation clause is to apply to the word used in the particular clause of the act which is under consideration."

Vide also cases there cited.

Other sections of the railway act aid us, I think, in coming to the conclusion that the legislature never contemplated the imposition of the burden referred to.

Section 90 specifies certain general powers which the company may exercise, and among them, it has the [434] right,—(g), to construct across or over any river, stream, or water course, permanent embankments, aqueducts, bridges, arches, etc.,—(h), to divert or alter, as well temporarily as permanently, the course

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of any stream, river, or water course, in order to carry the same under the railway.

Section 91 provides that, if in the course of the construction of a railway, a river, stream, or water course has been diverted or altered, it shall be restored as nearly as possible to its former state so as not materially to impair its usefulness.

Sections 178 and 179, the one providing that no company shall cause any obstruction in or impede the free navigation of any river or stream across which its railway is carried, and the other, in substance, that where the railway is carried across any navigable river, the company shall leave open certain spaces between the bridge piers, and shall erect such swing or other bridges over the river's channel as the Governor General in Council may direct, both indicate that in such cases the idea of fencing was wholly foreign to the mind of the legislature.

These provisions of the railway act and the considerations to which I have referred lead, I think, to the inevitable conclusion that fencing is necessary only upon each side of the company's roadbed where such fencing will protect the landowners from danger or injury by the engines or trains of a railway to any of the landowner's cattle which otherwise might stray thereon, and that where the fence is properly attached to the piers of a bridge crossing a water course so as effectually to prevent access of the cattle to the roadway above, the bridge piers and the bridge itself must be deemed to be sufficient fencing, and that, in case of navigable streams at least, no fencing at all was ever contemplated or was necessary.

[435] If this view of the case be the correct one, then the plaintiff's right to recover wholly fails. No negligence or breach of statutory duty can be imputed to the railway company, and the plaintiff's remedy, if any, must be against his lessors, or the persons through whose negligence the accident happened.

It may be advisable, however, that I refer to another point to which reference was made at the argument. The plaintiff rested his whole case, according to the statement of claim, upon the company's neglect to erect and maintain proper fences across the water course on both sides of the culverts. No claim was

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made by reason of the alleged defective cowcatchers on each side of the highway where it crosses the railway track. Leave was, however, given at the trial to add a paragraph setting up the insufficiency of these guards. During the course of the trial, counsel for the defendant contended that the company's liability depended upon the correctness of the plaintiff's claim as to the fencing across the water course, admitting that, if that contention was right, the company was liable, and it was thereupon, as I read the case, admitted in substance that the horses got through the south field to the north field through a culvert, and that there was no one in charge when they got upon the highway, and it was thereupon agreed that no evidence should be given as to the sufficiency or insufficiency of the cattle guards. Evidence was, however, given subsequently upon that point.

The learned trial judge did not, I suppose, in view of the admission that was made, pass upon that question, but as there might be some question as to this, it is I think, well here to state, which I think counsel for the plaintiff admitted at the trial, that in my view the question as to the cattle guards cannot be raised. This, I think, [436] necessarily follows from § 271, above cited. The horses in question were admitted to be at large upon the highway within half a mile of its intersection with the line of railway. They were in charge of no one so as to prevent their loitering or stopping on the highway at the point of intersection. It was at that point they were killed, and the owner has not, therefore, any right of action by reason of such killing. This point was expressly decided in the case of *Nixon* v. *The Grand Trunk Railway Co.* (1892) 23 Ont. Rep. 124, and as I understand the judgment of the court below the soundness of the judgment of the late Mr. Justice Rose in that case was not called in question.

The result is that the appeal is allowed and judgment shall be entered for the defendant with costs incurred in the courts below. Pursuant, however, to the undertaking contained in the order of the court below allowing this appeal, the respondent is entitled to the costs of this appeal, each party to have the right

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of set-off and the party in whose favor the balance of costs is found to have execution therefor.

Girouard, J., concurred.

Appeal allowed, with costs to respondent as directed.

Solicitor for the appellant: *John Bell.*
Solicitors for the respondent: *Teetzel, Harrison, & Lewis.*

Note.—Duty of railroad to fence as requiring barrier across culvert or under bridge.

In *Cagwin* v. *Chicago & N. W. R. Co.* (1901) 113 Iowa, 175, 84 N. W. 1032, a case involving a state of facts very similar to that in GRAND TRUNK R. Co. v. JAMES, it was held that the railroad's statutory duty to fence its tracks was fulfilled by the construction of a fence connecting with the abutments of a bridge, so high that cattle could not get upon the railway at that point, and therefore that the railroad company was not liable for the killing of cattle which passed under the bridge, and so on to a highway, and thence to a railway crossing, where they were struck and killed by a train. The court said: "If plaintiff is correct that the fence should have been run across the creek bed on either side of the bridge to bar the passage of stock to the highway, then it is the highway that the company is obliged to fence. In our opinion, the fence which a railway company is called upon to build is for the purpose of keeping live stock off its track, and not to aid in confining them in an inclosure. That it often, and, indeed, usually, serves this double purpose, does not affect the question. Its duty is a single one, and, when performed, absolves it from liability."

But in *Keliher* v. *Connecticut River R. Co.* (1871) 107 Mass. 411, it was held that the statutory duty of a railroad company to make and maintain fences suitable for the benefit and security of the landowner and of travelers upon the road, upon both sides of the railroad for its entire length, and to "construct and maintain sufficient barriers at such places as may be necessary, and where it is practicable to do so to prevent the entrance of cattle upon the road," was not complied with where the railroad omitted to construct a barrier across a culvert through which plaintiff's cow escaped from her pasture at a time when low water permitted, and, after straying upon another's land for a short distance, came upon defendants' track through an opening at a point where defendants were bound to maintain a suit-

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able fence. The court said: "In this state of facts there seems to be no reason for excusing the defendants from liability. The statute is not intended to be confined to cases in which cattle pass directly from the pasture to the railroad. It is enough if the escape of the cow was owing to the insufficiency of a fence which the railroad company was bound to maintain, and it is no excuse to the defendants that after she had escaped from that cause she passed over land of another proprietor and so found her way upon the track by a similar deficiency at another place where they were also under the same obligation."

In the present connection it may also be of interest to notice a few decisions as to what obstructions to the egress of live stock may be the equivalent of a sufficient fence.

In *Hilliard* v. *Chicago & N. W. R. Co.* (1873) 37 Iowa, 442, the court said that it saw no good reason why a bluff, a hedge, a trench, a wall, a trestle, or the like may not be of equal security with the statutory defined lawful fence, and that if so found in fact, it would, under the statute, be a lawful fence.

In *Toledo, P. & W. R. Co.* v. *Sweeney* (1886) 41 Ill. 226, it was held that an embankment from 12 to 20 feet in height could not be considered as obviating the necessity of a fence, in the absence of evidence that it was not so gradual in its slope that cattle could ascend it.

In *Meier* v. *Northern P. R. Co.* (1908) 51 Or. 69, 93 Pac. 691, it was held to be a question for the jury whether a pond 3½ feet deep, through which plaintiff's horse escaped onto the right of way and was killed, was a lawful fence within a statute providing that all ponds or other natural obstructions "if equally secure against the trespass of any domestic animals, or made so by artificial means," shall be deemed lawful fences.

In *Taylor* v. *Spokane Falls & N. R. Co.* (1903) 32 Wash. 450, 73 Pac. 499, it was said that while it is no doubt true that natural barriers are equivalent to a legal fence, where they answer the purpose of a fence and are used as such in connection with a fence, such carriers cannot be held to constitute a fence, though competent for the purpose, where there is no attempt to fence the track and there is free access at each end of such barriers.

In *White Water Valley R. Co.* v. *Quick* (1868) 30 Ind. 384, in which it was held that a railroad occupying the old towpath of a canal abandoned as a thoroughfare was bound to fence along the canal, no question seems to have been raised as to the sufficiency of the canal to take the place of a fence.

And in *White Water Valley R. Co.* v. *Quick* (1869) 31 Ind. 127, it was held that the railroad was bound to fence an embankment by which it crossed the bed of the canal.

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Another case of interest in connection with GRAND TRUNK R. Co. v. JAMES is *Kimball* v. *St. Louis & S. F. R. Co.* (1903) 99 Mo. App. 335, 73 S. W. 224, where it was held that the court below erred in charging the jury that the railroad company was not liable for the killing of a cow upon the track, if the cow escaped from the pasture through a defective place in the fence, wandered into a public road, and afterward entered the railroad track at a crossing and was there killed. E. S. O.

[ENGLISH DIVISIONAL COURT.]

ANDREWS *v.* RAMSAY & COMPANY.

[1903] 2 K. B. 635.

Also Reported in 72 L. J. K. B. N. S. 865, 89 L. T. N. S. 450; 19 Times L. R. 620, 52 Week. Rep. 126.

Principal and agent — Secret profit — Right to retain commission.

An agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal, but is not entitled to any commission from his principal.

(July 15, 1903.)

APPEAL from the Clerkenwell County Court.

The plaintiff was a builder, and the defendants were auctioneers and estate agents. In June, 1902, the plaintiff, who was the owner of certain property, instructed the defendants to endeavor to find a purchaser for it at the price of 2,500*l.*, and he agreed that if the defendants sold at that price he would pay them 50*l.* as commission.

In July the defendants wrote to the plaintiff that a Mr. Clutterbuck had offered 1,900*l.* for the property, but this offer the plaintiff refused. Subsequently the plaintiff agreed to sell the property to Clutterbuck for 2,100*l.*, the defendants saying that that was the best price they could get. Thereupon Clutterbuck paid to the defendants 100*l.* deposit, and the defendants paid over to the plaintiff 50*l.*, and retained the remaining 50*l.* with the plaintiff's consent as commission due to them.

It subsequently transpired that Clutterbuck and the defend-

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ants had had previous transactions with respect to sales of property, and that in this case Clutterbuck had paid the defendants 20*l.* as commission from him. On this coming to the plaintiff's knowledge he brought an action against the defendants to recover this secret commission of 20*l.*, and the defendants paid that amount into court. The present action was then brought to recover the 50*l.* retained by the defendants as commission, and the County Court judge gave judgment for the plaintiff.

The defendants appealed.

Neilson, for the defendants. The defendants are entitled to retain the commission. The plaintiff has had the benefit of their services, and it cannot be said that there was a total [**636**] failure of consideration for the plaintiff's promise to pay commission. The plaintiff, by suing for and receiving the 20*l.* paid by Clutterbuck to the defendants, has approbated the transaction. The County Court judge relied on the decision in *Salomons* v. *Pender* (1865) 3 Hurlst. & C. 639, 34 L. J. Exch. N. S. 95, 11 Jur. N. S. 432, 12 L. T. N. S. 267, 13 Week. Rep. 637, in which the circumstances were very different. [He also referred to *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch. D. 339, 59 L. T. N. S. 345; *Mayor, &c., of Salford* v. *Lever* [1891] 1 Q. B. 168, 60 L. J. Q. B. N. S. 39, 63 L. T. N. S. 658, 39 Week. Rep. 85, 55 J. P. 244.]

Chester Jones, for the plaintiff, was not called upon to argue.

Lord Alverstone, Ch. J.: In this case an action was brought to recover a sum of 50*l.*, which had been retained by the defendants with the assent of the plaintiff as their remuneration for their services in negotiating the sale of the plaintiff's house. The main point of the case is the suggestion that, because the defendants, while acting as the plaintiff's agents, had received from the purchaser 20*l.* as a secret profit, and because when that was discovered by the plaintiff the defendants had paid over that 20*l.* to the plaintiff, the plaintiff is not entitled to recover back from the defendants the amount retained by them by way of commission. I cannot see how that fact has anything to do with the matter. The 20*l.* was recoverable by the plaintiff from the defend-

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ants because it was a secret profit made by them, and came out of the sum which the purchaser would, it may be assumed, have been willing to pay for the house, and it therefore rightly belonged to the plaintiff. That the plaintiff was undoubtedly entitled to the 20*l.* seems to me to have no bearing on the question whether the defendants were entitled to commission from the plaintiff. It is said that the defendants ought not to be called upon to hand over the 50*l.* to the plaintiff, because the plaintiff has had the benefit of their services. The principle of *Salomons* v. *Pender* (1865) 3 Hurlst. & C. 639, 34 L. J. Exch. N. S. 95, 11 Jur. N. S. 432, 12 L. T. N. S. 267, 13 Week. Rep. 637, seems to me to govern the case, and it is, in my opinion, amply sufficient to do so. In that case it was held that an agent who was himself interested in a contract to purchase property of his principal was not entitled to any commission from the principal. The principle there laid [**637**] down is that, when a person who purports to act as an agent is not in a position to say to his principal, "I have been acting as your agent, and I have done my duty by you," he is not entitled to recover any commission from that principal. In *Salomons* v. *Pender* (1865) 3 Hurlst. & C. 639, at p. 642, Bramwell, B., said: "It is true that . . . the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say, 'What you have done has been done as a volunteer, and does not come within the line of your duties as agent.'" And in the same case Martin, B., quoted the passage from Story on Agency, p. 262, § 210, where it is said: "In this connection, also, it seems proper to state another rule, in regard to the duties of agents, which is of general application, and that is that, in matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and even if impartiality could possibly be presumed on the part of an agent, where his own interests were

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concerned, that is not what the principal bargains for; and in many cases, it is the very last thing which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may."

It seems to me that this case is only an instance of an agent who has acted improperly being unable to recover his commission from his principal. It is impossible to say what the result might have been if the agent in this case had acted honestly. It is clear that the purchaser was willing to give 20*l.* more than the price which the plaintiff received, and it may well be that he would have given more than that. It is [**638**] impossible to gauge in any way what the plaintiff has lost by the improper conduct of the defendants. I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better. The result is that the County Court judge was right, and this appeal must be dismissed.

Wills, J.: I am of the same opinion; and, whilst I agree with the principles laid down by my Lord, I would like also to point out that under the particular circumstances of this case there is yet another reason why the defendants ought not to succeed. The 50*l.* in question was paid by the purchaser to the defendants as agents for the plaintiff as part of the 100*l.* deposit on the purchase, and the defendants were allowed by the plaintiff to retain 50*l.* in the belief that they had earned that sum as commission. If the money had all been paid over, and the defendants had had to sue the plaintiff for commission, it seems to me perfectly clear that they could not recover it. They would have

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no chance whatever of succeeding in such an action, and I think that they ought not to stand in any better position because the plaintiff, believing that they had acted properly, had allowed them to retain the 50*l*. The case ought to be the same whether the commission has already been paid or whether the agent has to sue for it.

Channell, J., concurred.

Appeal dismissed.

Solicitors for appellants: *Whittington, Son, & Barham.*
Solicitors for respondent: *Lewis & Sons.*

Note.—Right of broker held to account for secret profit, to retain commission.

In 4 R. C. L. 325, it is said: "As a general proposition the faithful discharge of his duties is a condition precedent to any recovery upon the part of a broker for the services he has rendered his principal. (45 L.R.A. 33, note.) Thus, his right to compensation is barred if he violates his duty to disclose to his principal any personal knowledge which he possesses relative to matters which are or may be material to his employer's interests (*Carter* v. *Owens*, 25 L.R.A.(N.S.) 736 and note; *Farnsworth* v. *Hemmer* (1861) 1 Allen, 494, 79 Am. Dec. 756; *Roche* v. *Smith* (1900) 176 Mass. 595, 51 L.R.A. 510, 79 Am. St. Rep. 345, 58 N. E. 152; *Bell* v. *McConnell* (1881) 37 Ohio St. 396, 41 Am. Rep. 528; *Wilkinson* v. *McCullough*, 79 Am. St. Rep. 702, and note; *Butler* v. *Baker* (1892) 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019, 93 Am. Dec. 174, note; 45 L.R.A. 33, et seq. note; 53 L.R.A. 243, note), or if he acts adversely thereto (*Plotner* v. *Chillson* (1908) 21 Okla. 224, 129 Am. St. Rep. 776, 95 Pac. 775; 93 Am. Dec. 174, note; 79 Am. St. Rep. 706, note), either for the purpose of aiding another or with the design of securing a secret profit for himself (*Little* v. *Phipps* (1911) 208 Mass. 331, 34 L.R.A. (N.S.) 1046, 94 N. E. 260), or otherwise advancing his own welfare at the expense of that of his employer (45 L.R.A. 37, note). In like manner, a broker who secretly purchases from or sells to his employer is not entitled to his commissions in the absence of a special contract to the contrary (*Christianson* v. *Mille Lacs Land & Loan Co.* 31 L.R.A.(N.S.) 536 and note; Ann. Cas. 1912A, 200 and note; *Jansen* v. *Williams* (1893) 36 Neb. 869, 20 L.R.A. 207, 55 N. W. 279). Bad faith or fraudulent conduct of any description on the part of a broker is a perfect defense to any action he may institute for the

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recovery of his commissions (*Roche* v. *Smith* (1900) 176 Mass. 595, 51 L.R.A. 510, 79 Am. St. Rep. 345, 58 N. E. 152; 93 Am. Dec. 177, note; 45 L.R.A. 36, note)."

Upon the question whether the general principle above stated operates to deprive a broker of his commission where he is obliged to account to his principal for his secret profit, the weight of authority accords with ANDREWS v. RAMSAY in holding that it has such effect; although in one or two instances it has been held that a forfeiture of commissions should take place only where the agent has been actually dishonest. These cases appear to go on the theory that the loss of commissions is in the nature of a penalty for moral obliquity; whereas the theory upon which the broker is not allowed to recover for his services is that he had not been what his principal contracted for,—a disinterested agent.

It should be noted, however, that the doctrine of ANDREWS v. RAMSAY has been held, in *Hippisley* v. *Knee Bros. post,* 193, not to extend to a case where the agent in good faith has neglected to account for a commission or rebate allowed in some matter which has no direct bearing on the main duty or business of the agent. Also, it has been held in *Nitedals Taendstikfabrik* v. *Bruster* [1906] 2 Ch. 671, 75 L. J. Ch. N. S. 798, 22 Times L. R. 724, that the doctrine laid down in ANDREWS v. RAMSAY does not apply to the case of an agency in which the various transactions are separable, so as to entitle a principal to refuse to pay commission to his agent in respect of cases in which the agent has acted honestly, merely because there are other cases in which the agent, acting under the same agreement with him, has acted improperly and dishonestly.

In *Taylor* v. *Godbold* (1905) 76 Ark. 395, 88 S. W. 959, it is said that it is unquestionably good law as well as good morals that the unfaithful broker who seeks a profit of the transaction other than the commission for his brokerage cannot recover of his principal for any commission.

In *Little* v. *Phipps* (1911) 208 Mass. 331, 34 L.R.A.(N.S.) 1046, 94 N. E. 260, it was held, upon an accounting between the parties, that the broker was neither entitled to retain a secret profit made by him nor to be allowed a commission, the court saying: "If the agent does not conduct himself with entire fidelity towards his principal, but is guilty of taking a secret profit or commission in regard to the matter in which he is employed, he loses his right to compensation on the ground that he has taken a position wholly inconsistent with that of agent for his employer, and which gives his employer, upon discovering it, the right to treat him, so far as compensation, at least, is concerned, as if no agency had existed. This may operate to give to the principal the benefit of valuable services rendered by the agent, but the agent has only himself to blame for that result."

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Other instances in which an agent making a secret profit has been held not only to be bound to account therefor to his principal, but also not to be entitled to any compensation, are *Collins* v. *McClurg* (1892) 1 Colo. App. 348, 29 Pac. 299; *Sankey* v. *Cramer* (1913) 24 Colo. App. 16, 131 Pac. 288; *Schleifenbaum* v. *Rundbaken* (1909) 81 Conn. 623, 71 Atl. 899; *Dahlgren* v. *Story* (1912) 39 App. D. C. 29; *Jeffries* v. *Robbins* (1903) 66 Kan. 427, 71 Pac. 852; *Deter* v. *Jackson* (1907) 76 Kan. 568, 92 Pac. 546; *Krhut* v. *Phares* (1909) 80 Kan. 515, 103 Pac. 117; *Hogle* v. *Meyering* (1910) 161 Mich. 472, 126 N. W. 1063; *La Forge* v. *Cornell* (1911) 127 N. Y. Supp. 453; *Hahl* v. *Kellogg* (1906) 42 Tex. Civ. App. 636, 94 S. W. 389; *Easterly* v. *Mills* (1909) 54 Wash. 356, 28 L.R.A.(N.S.) 952, 103 Pac. 475; *Warren* v. *Burt* (1893) 7 C. C. A. 105, 12 U. S. App. 591, 58 Fed. 101; *Price* v. *Metropolitan House Invest. & Agency Co.* (1907) 23 Times L. R. 630.

See also in this connection *Fulton* v. *Walters* (1905) 28 Pa. Super. Ct. 269, and *Ryan* v. *Kahler* (1898) — Tex. Civ. App. —, 46 S. W. 71, where the recovery of compensation was denied on the ground that the agent had made a secret profit out of the transaction; and *Guidetti* v. *Tuoti* (1907) 52 Misc. 657, 102 N. Y. Supp. 499, where the principal was held entitled to recover back a commission which he had paid, on the ground of the agent's misconduct in not accounting for a profit which he had made on the transaction.

So, where a broker employed to purchase property on the understanding that any commission or brokerage chargeable was to be got out of the vendor purchased property at a price lower than that quoted, receiving, however, the full amount quoted from his principal, he must account for the secret profit thus made by him without allowance by way of commission or brokerage. *Hutchinson* v. *Fleming* (1908) 40 Can. S. C. 134.

And in an action for deceit in misrepresenting the price of land purchased for the principal, the agent cannot offset expenses incurred in making the purchase, such as attorneys' fees, brokerage charges, and the like. *Jameson* v. *Kempton* (1909) 52 Wash. 106, 100 Pac. 186.

In *Manitoba & N. W. Land Corp.* v. *Davidson* (1903) 34 Can. S. C. 255, it appeared that one having an exclusive right to sell certain land at a stated price per acre on commission met a prospective buyer who wanted time to make financial arrangements. As by granting such time the broker might lose a chance for making a sale of the land, he suggested the propriety of his receiving a sum of money, whereupon the prospective purchaser agreed to pay him $500. It was held in the court below (14 Manitoba, L. Rep. 232) that though the broker failed in his duty to his employer in not informing him of the offer or promise of the $500 made by the prospective pur-

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chaser for an extension of time, that failure did not and could not affect the transaction itself, or cause any prejudice to the employer, as the stated price of the land was agreed upon, and was not to be lowered by any collateral agreement between the prospective purchaser and the broker, and could not result in any loss to the principal, and therefore that while the broker would have been accountable to his principal for the $500 had he received it, his misconduct was not such as should be held to deprive him of his commission. This decision was reversed by the Supreme Court of Canada, which held that the consent of the broker to accept the money was a breach of his duty, which disentitled him from recovering the commission; Nesbitt, J., delivering the judgment of the court, saying: "The question is: Does such a transaction as this disentitle him to the payment of his commission, assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff by making such an undisclosed bargain in relation to his contract of service put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson [the broker] in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission, but $500 commission as a secret profit. It put him in a position where he was getting pay for the very time which the company were agreeing to pay him for while securing the purchaser, and his duty as agent was to get the highest price possible for his employer; and it is perfectly evident from his own statement that Grant was a person who was willing to pay at least $500 more for the property and probably a considerable advance on that."

The foregoing decision is criticized by Galt, J., in *Complin* v. *Beggs* (1913) 13 D. L. R. 27, as stretching the rule against secret commissions to an extreme limit, because it deprived of his commission an agent who was not shown to have been actually dishonest. The learned judge enunciates the view that the acceptance of a commission from the opposite party by an agent acting without any dishonest intention, but with a mistaken notion of his rights, does not disentitle him to a commission. This conclusion is at variance with the view expressed in some of the American cases that the doctrine has its foundation not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition, "Lead us not in to temptation, but deliver us from evil," and which caused the announcement of the infallible truth, "A man cannot serve two masters."

In *Neighbor* v. *Pacific Realty Asso.* (1912) 40 Utah, 610, 124 Pac. 523, Ann. Cas. 1914D, 1200, where a broker employed to procure a

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purchaser and given an option to purchase on terms specified began negotiations with a third person who desired to purchase, and then exercised the option and sold the property to the third person at an advance, it was held that though the broker must account to his principal for the profit made by him, yet as he had not been guilty of any intentional wrong he should not be deprived of his commission.

On the other hand, it was said in *Merryman* v. *David* (1863) 31 Ill. 404, that an agent having received more than he accounted for to his principal would be liable to his principal to refund the amount retained beyond his compensation; but as the question in that case was whether he might be held accountable to the other party for a secret profit, this statement is purely *obiter* and the concession of the right of such an agent to compensation seems merely to be a piece of judicial inadvertence.

The principle of *Hippisley* v. *Knee Bros. post,* 193, that the neglect of an agent to account for a profit made by him in some manner which has no direct bearing on the main duty or business of the agent is not, for that reason, to be deprived of his commission, is also exemplified by the case of *Jacobus* v. *Munn* (1883) 37 N. J. Eq. 48, where it was held that a trustee who had for thirty years the sole management of a large amount of real estate, involving great responsibility and care and the expenditure of large sums of money, did not, by receiving and retaining presents from one of the tenants, and from some of the mechanics who were employed by him to repair the houses, which he openly admitted at the time and since, and which caused no loss whatever to the estate, did not thereby forfeit his commission, he having been guilty of no intentional fraud or mismanagement, though he was held bound to account to the estate for the money so received. But upon appeal (in 38 N. J. Eq. 622), the court refused to deal so leniently with the trustee, saying: "The person who, for twenty-five years, managed this property, must have had intelligence enough to perceive that the acceptance by him, for his personal use, of $50 per year for five successive years, from a tenant of the estate, was a diminution of the revenue of the estate for his benefit, for which no excuse could be pleaded *in foio conscientiæ.* The payment of gratuities by workmen whose bills he was to scrutinize, and only pay if reasonable and correct, could not be viewed by anyone of competent intellect as other than an inducement to diminish scrutiny, or bring about the payment without due examination. Nor do I think that it is shown that the estate has suffered no loss. While the evidence lacks sufficient force to establish and charge the executor with positive loss other than the gains he received, it by no means follows that loss did not occur. But whether loss to the estate resulted or not is, in my judgment, immaterial. For if it be admitted that no loss resulted beyond that acquired by

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the executor, I am still of the opinion that a decree against an executor who has thus misconducted himself, which only deprives him of his improper gain, does not inflict an adequate penalty upon him. If such a rule should be established, it would be attended, I apprehend, with disastrous results. To restrain the tempted trustee from misconduct, there needs some other penalty than the mere liability, in case of discovery, to be forced to account to the estate for ill-gotten gains. On grounds of plain public policy, courts ought not to relax the obligations of trustees, or relieve them from adequate penalties. Were the question now raised for the first time and in an ordinary case, I should strongly incline to the view that the executor should be deprived of all his commissions. But it is within the discretion of the court whether to deprive him of all or of only part of his commissions,—a discretion to be exercised in view of all the circumstances of the case." E. S. O.

[ENGLISH DIVISIONAL COURT.]

HIPPISLEY *v.* KNEE BROTHERS.

[1905] 1 K. B. 1.

Also Reported in 74 L. J. K. B. N. S. 68, 92 L. T. N. S. 20, 21 Times L. R. 5.

Principal and agent — Secret profit received by agent without fraud — Right of agent to retain his commission.

The plaintiff employed the defendants, auctioneers, to sell goods for him by auction upon the terms that they were to be paid a lump sum by way of commission, and were further to be paid "all out of pocket expenses," including the expenses of printing and advertising. The defendants in due course sold the plaintiff's goods. In rendering their account of the out of pocket expenses to the plaintiff they debited him with the gross amounts of the printers' bill and of the cost of advertising in the newspapers, they having in fact received discounts both from the printers and the newspaper proprietors,—a fact of which the plaintiff had no knowledge. There was evidence of a general custom for printers and newspaper proprietors to deal with auctioneers as principals, and to allow them a trade discount off their retail charges, which discount they would not allow to the auctioneers' customers if they dealt with them directly, and the defendants in omitting to disclose the fact of the discounts to the plaintiff did so in the honest belief that they were lawfully entitled under the custom to receive the discounts and retain them to their own use:—

Held, that although the defendants were not entitled to debit the plaintiff with the gross amounts of the printing and advertising bills,

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inasmuch as by the terms of the employment they were only to be paid their actual out of pocket expenses, yet, as they received the discounts without fraud, and as the duty to account correctly for the out of pocket expenses was merely incidental to and separable from their main duty connected with the sale of the goods, the omission to disclose the receipt of the discounts to the plaintiff did not disentitle them to retain their commission.

Andrews* v. *Ramsay **[1903] 2 K. B. 635, *ante*, 184, 72 L. J. K. B. N. S. 865, 89 L. T. N. S. 450, 19 Times L. R. 630, 52 Week. Rep. 126, distinguished.**

(October 27, 1904.)

APPEAL from the Bristol County Court.

The plaintiff employed the defendants, a firm of auctioneers, to sell some pictures and other articles for him by auction upon terms which were set out in a letter from the defendants to the plaintiff and dated July 25, 1903, and which was as follows: "Referring to our interview with you as to the sale of your furniture and effects, we now beg to confirm the terms arranged, *viz.*, 5 per cent on all lots sold and all out of pocket expenses in addition, which includes advertisements, printing and posting bills, printing and circulating catalogues, porters' time, postages, use of sale room, etc. The cost of removal from the various places, including clerk's time checking, to be 4*l.* 10*s.* 8*d.* Use of sale room to be 10*s.* per week to date of sale. Minimum commission on sale for personal services to be 20*l.* Any other work, price to be arranged." The defendants, in pursuance of the said employment, instructed a firm of printers to print the posters and catalogues. The printers did the work and debited the defendants' account with the sum of 13*l.* 9*s.*, that being the price which they would have charged to any ordinary customer. The printers, however, allowed to the defendants because they were auctioneers the trade discount of 10 per cent, amounting to 1*l.* 6*s.* 10*d.* The defendants also advertised the sale in certain newspapers, and upon the gross payments for the advertisements, amounting to 14*l.* 6*s.* 4*d.*, they received from the newspaper proprietors a discount of 10 per cent, amounting to 1*l.* 8*s.* 7*d.* The sale took place in due course, and the plaintiff's goods were sold for an aggregate amount of less than 400*l.*, whereupon the minimum commission of 20*l.* became payable. The defendants, in

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the account sent by them to the plaintiff, charged him with the full amount of the printers' bill, 13*l.* 9*s.*, and of the charges for newspaper [3] advertisements, 14*l.* 6*s.* 4*d.*, without making any rebate to him in respect of the discounts allowed to them, and, having deducted from the gross sum realized by the sale the sum of 20*l.* for minimum commission with the two above-mentioned sums of 13*l.* 9*s.* and 14*l.* 6*s.* 4*d.*, and a further sum for money lent, they paid the balance to the plaintiff. Subsequently, the plaintiff, having discovered the fact of the defendants having received the said discounts without disclosing the fact to him, brought his action in the county court to recover the two sums of 1*l.* 6*s.* 10*d.* and 1*l.* 8*s.* 7*d.*, and also the 20*l.* minimum commission, on the authority of *Andrews* v. *Ramsay* [1903] 2 K. B. 635, *ante,* 184, 72 L. J. K. B. N. S. 865, 89 L. T. N. S. 450, 19 Times L. R. 620, 52 Week. Rep. 126. At the hearing evidence was given of a general custom for printers and newspaper proprietors to deal with auctioneers as principals, and to allow them as trade customers a trade discount off their retail charges, the whole of the retail price being charged by the auctioneers against the vendors. The defendants honestly believed that they were entitled under this custom to receive the said discounts and retain them to their own use. The plaintiff admitted that he knew there was a custom for newspaper proprietors to allow a discount to auctioneers, but he did not know the amount of it, or that the defendants would receive such a discount in the present case. He was not aware that there was any custom for printers to allow such a discount, or that the defendants would receive it from the printers. The County Court judge held that the defendants in contracting with the printers and newspaper proprietors acted as principals, and not as agents for the plaintiff, that the plaintiff was not damnified by their receipt of the discounts, and that the defendants were consequently entitled to retain them. He accordingly held that the plaintiff could not recover any one of the three sums claimed. The plaintiff appealed.

Clavell Salter, K.C., and **Soper,** for the appellant. The defendants were not entitled to charge the plaintiff with the

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amount of the discounts, for in incurring the expenses for printing and advertising they were acting as agents for the plaintiff. [4] The fact that the printers and newspaper proprietors looked to them for payment did not make them any the less agents. Then if so, the well-established rule as to secret profits made by agents applies. In *Parker* v. *McKenna* (1874) L. R. 10 Ch. 96, at p. 118, Lord Cairns, L.C., thus stated the rule: "Now the rule of this court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. . . . All that the court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency." Further, there is in the present case the additional reason that the defendants expressly stipulated for their "out of pocket expenses" and nothing more, and under that term cannot be included a sum which they did not in fact pay. The existence of the custom for auctioneers to receive these discounts and the consequent bona fides of the defendants are immaterial. The only material question is whether the plaintiff in fact knew that his agents were being allowed the discounts, and the finding is that he did not. Then if the defendants are not entitled to charge the plaintiff with the discounts, neither are they entitled to their commission of 20*l.* *Andrews* v. *Ramsay* [1903] 2 K. B. 635, *ante,* 184, 72 L. J. K. B. N. S. 865, 89 L. T. N. S. 450, 19 Times L. R. 620, 52 Week. Rep. 126, where it was held that an agent to sell property, who has sold the property but received a secret profit from the purchaser, must not only account for that profit to his principal, but is not entitled to any commission from his principal. No distinction can be drawn between that case and the present, upon the ground that there the secret profit was received from the purchaser and here from third persons; the net result to the vendor is the same. The advertising and printing are just as important parts of the agency as the conduct of the sale itself in the auction room, and there was one entire remuneration for

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all the duties that the defendants were employed to perform,—namely, the commission of 20*l.*

Duke, K.C., and **Thornton Lawes**, for the defendants.

[5] [**Lord Alverstone**, Ch. J.: We are satisfied that there is no case to recover back the commission, and only wish to hear the defendants on the subject of the discounts.]

There is a distinction between cases in which a person is acting solely as agent for a principal in making a contract and cases in which the principal employs an agent who to his knowledge will have to make contracts with third persons on his own behalf for which he will have to pledge his own credit. Where the agent in the known course of business makes a contract on which he is liable he is entitled to make a profit on it, and not merely to have an indemnity against his out of pocket expenses. The custom of allowing these discounts to auctioneers is so universal that the plaintiff must have known, or ought to have known, that the defendants would receive them; indeed, he admitted that he knew there was a custom for newspaper proprietors to allow them on advertisements.

In *Great Western Insurance Co.* v. *Cunliffe* (1874) L. R. 9 Ch. 525, 43 L. J. Ch. N. S. 741, 31 L. T. N. S. 661, the defendants, insurance brokers, were employed by the plaintiffs to effect reinsurances for them. There was no provision for their remuneration for this work by the plaintiffs, and according to the custom they received from the underwriters a discount of 5 per cent, and also at the end of the year a further 12 per cent on the balance of the accounts if favourable. The plaintiffs knew of the 5 per cent discount, but did not know of the 12 per cent. But it was held that as the latter allowance, like the former, was according to a well-established practice which the plaintiffs might have ascertained if they had taken the trouble to inquire, the defendants were entitled to retain it. Similarly in *Baring* v. *Stanton* (1876) 3 Ch. D. 502, where a shipowner employed agents to effect insurances for him on his ships, and they in their accounts charged him with the full premiums, although they had received a 5 per cent brokerage from the underwriters and also a 10 per cent discount for cash, in accordance with the

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usual practice, it was held that, as the allowances were usual and the shipowner had never inquired on what terms the agents effected the insurances, he could not object to their retention by the agents. Mellish, L.J., said: "If that"—the [6] practice—"is generally known and acquiesced in, I cannot conceive that it is a fraud upon anybody. It may be a misfortune to Mr. Stanton that, being an American, he really did not know the usage in London. But if a person comes and trades in London he must make himself acquainted with the usages in London." The fact here that the contract expressly mentions "out of pocket expenses" is immaterial; it does not add anything to the rights and duties arising out of the ordinary relation of principal and agent.

Lord Alverstone, Ch. J.: I will deal first with that portion of the plaintiff's claim which relates to the two sums of 1*l.* 6*s.* 10*d.* and 1*l.* 8*s.* 7*d.*, which it is agreed are the amounts of the discount which the defendants, the auctioneers, received from the printers and the newspaper proprietors respectively on account of the printing and advertisement orders executed in connection with the sale which he conducted for the plaintiff. Now the employment of the defendants was in writing, and although the alleged custom of auctioneers to receive such discounts for their own use is very material in connection with the question of bona fides, it is sufficient in order to determine what the rights of the parties were in this particular case to look at the terms of the contract itself. The terms, which were confirmed by the defendants' letter of July 25, were: "5 per cent on all lots sold, and all out of pocket expenses in addition, which includes advertisements, printing and posting bills, printing and circulating catalogues, etc. . . . Minimum commission on sale for personal services to be 20*l.*" I draw attention to the provision that there was to be a minimum commission of 20*l.* The defendants thereby insured themselves against the risk of their work being unremunerative, the intention being that they were to look to that commission alone for the remuneration of their personal services, including their services in connection with the printing and the advertisements. So that even if there

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could have been a doubt as to the meaning of the words, "out of pocket expenses," the provision as to the minimum commission makes the matter free from doubt, and renders it abundantly clear that the defendants were to have the [7] 20*l.* commission and their actual out of pocket expenses, but nothing more. Therefore I think that upon that ground, wholly apart from the broader ground upon which Mr. Salter relied, the plaintiff is entitled to recover the two sums of 1*l.* 6*s.* 10*d.* and 1*l.* 8*s.* 7*d.*, and to that extent the judgment of the County Court judge must be reversed. Mr. Duke, indeed, contended that the court ought to allow these discounts to the defendants upon the ground that the custom for auctioneers to take them was so general that the plaintiff must have known, or ought to have known, that they were in fact being received. Of course, if to the knowledge of the principal they were being received by the agent, the profit ceased to be secret and the question would not arise; but where there is no knowledge the agent ought to account, and it is only honest that he should conduct his business on the principle of his liability so to account. The two authorities cited by Mr. Duke were cases in which it was obvious that the principal knew that the agent was being remunerated by third parties; therefore they in no way conflict with the principle which I have endeavored to lay down. Unfortunately there appears to prevail in commercial circles in which perfectly honorable men desire to play an honorable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognized that such secret profits ought to be disapproved of by men in an honorable profession, the better it will be for commerce in all its branches.

The other claim made by the plaintiff, and in respect to which we did not call upon the defendants' counsel, was that in consequence of the defendants' conduct they were not entitled to retain the 20*l.* which they had deducted from the gross proceeds for their commission, and in support of that claim Mr. Salter relied upon the judgment of this court in *Andrews* v. *Ramsay* [1903] 2 K. B. 635, *ante,* 184, 72 L. J. K. B. N. S. 865, 89 L. T. N. S. 450, 19 Times L. R. 620, 52 Week. Rep. 126, where we held that a dishonest agent could not recover any commission

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at all. I desire, speaking for myself, to say that in this case I am satisfied that there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled [8] to do under the contract: they thought that by reason of the alleged custom they were entitled to deduct from the proceeds of sale the gross amounts of the advertising and printing bills. That is enough to differentiate the present case from *Andrews* v. *Ramsay, supra,* where we were dealing with an agent who acted with downright dishonesty. But Mr. Salter went further, and contended that if there has been a failure by the agent to account for a secret discount received, even though that failure may have been due to a bona fide mistake, he is not entitled to receive any commission or remuneration for his services from the principal. I am not prepared to go that length. If the court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform. In my opinion, the neglect by the defendants to account for the discounts in the present case is not sufficiently connected with the real subject-matter of their employment. If the discount had been received from the purchasers the case would have been covered by *Andrews* v. *Ramsay, supra;* but here it was received in respect of a purely incidental matter; it had nothing to do with the duty of selling. It cannot be suggested that the plaintiff got by one penny a lower price than he would otherwise have got. Therefore I come to the conclusion that, so far as the 20*l.* commission is concerned, the plaintiff is not entitled to succeed.

Kennedy, J.: I am of the same opinion. Upon the general question with regard to the discounts received by the defendants on these bills I think the plaintiff is entitled to succeed. Out of pocket expenses were all that the auctioneers here were entitled to claim from the principal who employed them, and in fact they claimed what was not an out of pocket expense. It has been suggested that the meaning of the expression, "out

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of pocket expenses," might be qualified by the knowledge of the principal that in some of the contracts into which the [9] auctioneers would necessarily enter they might possibly be allowed a discount. It appears to me quite impossible, as it would be unjust, to act upon such a suggestion. If a principal, when contracting for the services of an agent, is told that the agent is going to receive a profit out of the agency beyond the remuneration that the principal is to pay, there can be no possible harm in the agent receiving it; but, unless it has been, in this way, authorized by the principal, the receipt of such a profit is an indefensible act. I quite agree with my Lord that in this case the defendants were only doing what they honestly believed to be right having regard to a general practice; but I should be sorry to say that the practice itself is an honest one, if it is to be taken as extending to cases in which the fact that the profit will be received and kept by the agent is not brought to the knowledge of the employer.

With regard to the 20*l.* claim, I agree with my Lord that this is not one of the cases in which it would be just to deprive the agent of his agreed remuneration as well as of his secret profit. I feel it is difficult to lay down any definite rule upon the subject with confidence, but I would venture to suggest the following: That where the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it,—and I here use that word "unfaithful" as including a breach of obligation without moral turpitude,—it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held in the Admiralty Court to forfeit his wages as a result of misconduct in any branch of his duty as a captain; but where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties. Here the auctioneers were employed for a certain commission to act faithfully as auctioneers. If they had improperly by connivance sold

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to a purchaser at a lower price than they could fairly have got, they would clearly [10] not have been able to recover their commission. There is nothing of this kind in the present case. But by the special terms of their contract they undertook, in addition to their duty as auctioneers, that if the plaintiff would pay them their out of pocket expenses they would truly account to the plaintiff for those expenses. And it seems to me that it would be wrong to say that because the defendants failed in the performance of their duty properly to account for the out of pocket expenses, therefore they are not to have their commission, although they performed all their duty as auctioneers faithfully.

Ridley, J.: I concur in the judgment of my Lord.

Judgment of County Court judge varied accordingly.

Solicitor for appellant: *G. F. Sutton, for Page & Thompson, Bristol.*

Solicitors for respondents: *Guscotte, Wadham, & Dawe, for Burges & Sloan, Bristol.*

Note.—For annotation of the point involved in the case above reported, see note appealed to *Andrews* v. *Ramsay, ante,* 184.

[ENGLISH DIVISIONAL COURT.]

JAMES JONES & SONS, LIMITED, *v.* EARL OF TANKERVILLE.

[1909] 2 Ch. 440.

Also Reported in 78 L. J. Ch. N. S. 674, 101 L. T. N. S. 202, 25 Times L. R. 714.

Specific performance — Injunction — Contract for purchase of timber to be cut and removed by purchaser — Mutuality — License — Revocation.

The plaintiffs entered into a contract with the defendant for the purchase of certain timber growing on his property. By the contract

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they were to have the right to enter upon the property, cut the timber, and saw it up thereon, to erect sawmills, and to remove the timber; and the defendant was to give free exit for all timber to hard roads and free sites for sawmills. The plaintiffs erected a sawmill and commenced to cut timber, saw it up, and remove it. The defendant subsequently repudiated the contract and forcibly ousted the plaintiffs and their men from the estate. The plaintiffs brought this action against the defendant, asking for an injunction restraining him from preventing the due execution of the contract, and for damages. The defendant contended, *inter alia*, that the claim for an injunction was equivalent to a claim for specific performance, and that the court would not grant specific performance of such a contract, but would leave the plaintiffs to their remedy by way of damages:—

Held, that although the court might be unable to compel the plaintiffs to cut the timber if they refused to do so, it had jurisdiction to give them relief by way of specific performance, and that the injunction ought to be granted.

(July 9, 1909.)

THE plaintiffs, James Jones & Sons, Limited, were a company carrying on business as timber merchants. In October, 1907, they entered into a contract in writing contained in letters and memoranda with the defendant, the Earl of Tankerville, for the purchase of timber growing on the Chillingham estates. By this contract the plaintiffs were to have the right to enter upon the estates and cut the timber and saw it up thereon, and for that purpose to erect sawmills and to remove the timber from the estates; the plaintiffs were to pay 1,565*l.* for the timber, and the defendant was to give free exit to hard roads for all timber and free sites for sawmills. The plaintiffs thereupon erected a sawmill and commenced to cut timber, saw it up at the mill, and remove it.

In February, 1908, a second contract was entered into whereby the plaintiffs were to pay 4,310*l.* for further timber on the estates [441] on similar terms. They accordingly entered and erected sawmills and machinery, and proceeded to fell timber and saw it up and carry it away. In September, 1908, Lord Tankerville repudiated the contracts and demanded that further cutting should cease, and on October 27, 1908, he forcibly ousted the plaintiffs and their men from the Chillingham estates, wrecked their sawmills, and upset their machinery, buildings, and stacks of timber.

The plaintiffs brought this action against him, asking for

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injunctions restraining him from preventing the due execution of the contracts, and for damages. The defendant raised many defenses, but the only question that calls for a report was his contention that the plaintiffs' claim for injunctions was equivalent to a claim for specific performance, and that the court would not grant specific performance of such contracts, but would leave the plaintiffs to their remedy by way of damages only.

Buckmaster, K.C., and **Schiller,** for the plaintiffs.

Romer, K.C., **Sheldon,** and **H. S. Mundahl,** for the defendant, after arguing that a fiduciary relationship existed between the plaintiffs and the defendant, that the plaintiffs failed to perform their duty to him, and that they could not insist upon carrying out the contract, continued: The injunctions asked for by the plaintiffs are equivalent to a decree for specific performance; but the court will not compel specific performance of the contract unless it can execute the whole contract on both sides. *Gervais* v. *Edwards* (1842) 2 Drury & War. 80, 1 Connor & L. 242, 4 Ir. Eq. Rep. 555, 6 Eng. Rul. Cas. 648. A contract to be specifically performed by the court must be mutual; it must be such that it might at the time when it was entered into have been enforced by either of the parties against the other of them. The court cannot as against the plaintiffs decree specific performance of these contracts to cut timber; therefore it will not order us to perform our part of the contracts. No property in the growing timber passed to the plaintiffs.

[**Parker,** J., referred to *Wood* v. *Leadbitter* (1845) 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161, 16 Eng. Rul. Cas. 49.]

A license to enter on real estate passes no interest and transfers no property (*Thomas* v. *Sorrell* (1671) Vaughan, 330, 351), and it can be revoked. The [**442**] contracts are not under seal, and the plaintiffs have no legal rights which the court will enforce by way of specific performance.

Buckmaster, K.C., in reply. There is no longer any magic in documents under seal. Since the decision in *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9, 52 L. J. Ch. N. S. 2, 46 L. T. N. S. 858, 31 Week. Rep. 109, the court will enforce an equitable right. This question is of no importance now, for under the

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sale of goods act 1893, the court can decree specific performance of an agreement to buy a chattel. A right to cut and carry away timber is in the nature of a profit *à prendre* and can be specifically enforced.

Cur. adv. vult.

Parker, J., read a judgment in which, after holding that no fiduciary relationship existed between the plaintiffs and the defendant, his Lordship said: It remains to be considered what relief the plaintiffs are entitled to. They ask for injunctions restraining the defendant from preventing the due execution of the contracts, as well as for damages. It was argued that this is a claim for specific performance, and that the contracts are such that the court cannot, or, at any rate, will not, grant specific performance, but will leave the plaintiffs to their remedy by way of damages only. It is said that in contracts of this sort there is a want of mutuality which precludes the remedy by way of specific performance. A contract for the sale of specific timber growing on the vendor's property, on the terms that such timber is cut and carried away by the purchaser, certainly confers on the purchaser a license to enter and cut the timber sold, and, at any rate as soon as the purchaser has severed the timber, the legal property in the severed trees vests in him. A license to enter a man's property is prima facie revocable, but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty. If A sells to B felled timber lying on A's land on the terms that B may enter and carry it away, the license conferred is an irrevocable license because it is [**443**] coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B. *Wood* v. *Manley* (1839) 11 Ad. & El. 34, L. R. 3 Prob. & Div. 5, 9 L. J. Q. B. N. S. 27, 3 Jur. 1028. On the other hand, if A by instrument not under seal for good consideration agrees that B shall have the right of shooting and carrying away game on A's estate for a term of years, the license conferred is at law a revocable license, because the nature of the interest intended

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to be conferred is a profit *à prendre,* and cannot at law be created otherwise than by deed. The agreement, however, confers on B a good interest in equity, and the license is in equity an irrevocable license, and a court of equity would accordingly restrain its revocation, and it would make no difference that B had agreed to keep down the rabbits, though this term could hardly be specifically enforced by any court. See *Frogley* v. *Earl of Lovelace* (1859) Johns. V. C. (Eng.) 333; *Lowe* v. *Adams* [1901] 2 Ch. 598, 70 L. J. Ch. N. S. 783, 50 Week. Rep. 37, 85 L. T. N. S. 195, 17 Times L. R. 763. Even, therefore, if no interest at law passes by a contract for the sale of specific growing timber to be cut by the purchaser, it is difficult to see why on principle equity should not restrain the vendor from revoking the license conferred by such a contract, though it might be unable to compel the purchaser to cut the timber if he refused to do so. When once the purchaser has cut any part of the timber, the legal property in the timber so cut is certainly in the purchaser, and the license so far as that timber is concerned is irrevocable even at law, and a court of equity in granting an injunction would only be restraining the violation of a legal right. An injunction restraining the revocation of the license, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the judicature act it may well be doubted whether the absence of a seal in such a case can be relied on in any court. *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9, 52 L. J. Ch. N. S. 2, 46 L. T. N. S. 85, 31 Week. Rep. 109. I do not think, therefore, that there is any substance in the objection that a timber contract of the kind I am considering cannot be specifically enforced by injunction because of a want of mutuality, and though there [**444**] is no direct authority on the point, it seems clear from the judgments in *Buxton* v. *Lister* (1746) 3 Atk. 383, and *Gervais* v. *Edwards* (1842) 2 Drury & War. 80, 83, 1 Connor & L. 242, 4 Ir. Eq. Rep. 555, 6 Eng. Rul. Rul. Cas. 648, that neither Lord Hardwicke nor Lord St. Leonards can have thought any such

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objection could be entertained. It is clear in both these cases that what was contemplated was specific performance in the sense of compelling the execution of an instrument under seal which would turn into legal rights what were under the contract rights in equity only; and I see no reason why the legal rights of entry which would be conferred by the execution of such an instrument would be rights which a court of equity would refuse to protect by injunction because the instrument might contain provisions which the court could not specifically enforce.

I am, however, not at all clear that a contract for the sale of timber to be cut by the purchaser does not confer an interest at law of such a nature as to make the license to enter and cut *ab initio* an irrevocable license. Baron Alderson in his well-known judgment in *Wood* v. *Leadbitter* (1845) 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161, 16 Eng. Rul. Cas. 49, commenting upon the case of *Web* v. *Paternoster* (1619) Palmer, Rep. 71, says that even if the license in that case had been a mere parol license, that is, a license not under seal, yet the strong probability was that Web had purchased the hay as a growing crop with liberty to stack it on the land, and then the license might be good as coupled with an interest. Inasmuch as he says elsewhere that a license to enter on the land of the licensor and make a water course to flow on the land of the licensor would be revocable unless under seal, because an easement of this nature would lie in grant only, and that a valuable consideration for such a license would make no difference, he must have been of opinion that the mere purchase of a growing crop of hay would or might confer an interest at law. Growing hay is not an emblement, and therefore what he says cannot be explained on the hypothesis that he was thinking of the sale of a mere chattel. Further, in *Marshall* v. *Green* (1875) 1 C. P. D. 35, 45 L. J. C. P. N. S. 153, 33 L. T. N. S. 404, 24 Week. Rep. 175, the plaintiff sued for trespass and trover in that the defendant had entered and cut down trees on the plaintiff's land. The land [**445**] was in lease, but the trees were reserved. Amongst other things the defendant pleaded leave and license, and an agreement under which the plaintiff had sold the trees to him with liberty to cut down and remove them. It appeared that

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this agreement was verbal only, and that after the defendant had cut six of the trees the plaintiff repudiated the bargain and withdrew the license. The defendant nevertheless cut down and carried away the remainder of the trees. A verdict was entered for the plaintiff, leave being reserved to the defendant to move for a verdict in his favor on the ground that the facts disclosed a right on the defendant's part to cut down and remove the trees. The defendant moved accordingly, and obtained a rule nisi which was subsequently made absolute. The actual points decided were (1) that the case was not within § 4, but was within § 17 of the statute of frauds, and (2) that the fact of the purchaser having cut six trees before the sale was repudiated was an acceptance and receipt of part of the goods sold within the meaning of § 17. But it seems clear that, unless the agreement conferred an irrevocable license, the plaintiff was entitled to succeed both in trespass and trover, though the defendant might have had a counterclaim for damages for breach of contract, and if the license were irrevocable it could, on the principles laid down in *Wood* v. *Leadbitter, supra,* only have been because the contract conferred on the defendant an interest at law in the timber comprised in it.

Lastly, in determining the effect of such a contract at law the effect of the sale of goods act 1893 has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or the purchaser, and § 52 of the act seems to confer on the court a statutory power of enforcing at the instance of a purchaser specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract.

I come to the conclusion, therefore, that the court has ample jurisdiction to grant the injunctions asked for, though, of course, [**446**] it is in its discretion, if it so thinks fit, to award damages in lieu of relief by way of injunction. Under the circumstances of this case, however, there is, in my opinion, every reason for not exercising this discretion.

With regard to the timber already cut which is the plaintiffs' property; with regard to their tenancy of the cattle boxes; with

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regard to their sawmills, machinery, and other property on the defendant's land, their rights at law under the contract have not only been infringed, but have been deliberately and wantonly disregarded with every circumstance of indignity and violence, and even if I thought that damages would be an adequate remedy for what they have suffered, I should feel it incumbent on me, if I could, to assert the authority of the law by refusing to allow the defendant to retain the benefits he has attempted to gain by his high-handed and illegal action. I propose, therefore, to grant relief by way of injunction, not by way of damages only.

[His Lordship then proceeded to assess damages to be paid by the defendant to the plaintiffs.]

Solicitors: *Faithfull & Owen; Brown & Woolnough, for Charles Percy & Son, Alnwick.*

Note.—Injunction against breach of contract which cannot be specifically enforced.

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I. In general.

The main question here treated is whether in any event equity will restrain a breach of contract, when the circumstances are such that equity will not specifically enforce it. Cases in which injunctions have been denied upon general equitable considerations, such as lack of irreparable damage, the adequacy of the plaintiff's remedy at law, the indefiniteness, oppression, or invalidity of the contract, and the like, are not considered unless they comment upon the question of adjective law, whether the fact that a contract cannot be enforced by

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an affirmative decree of specific performance is sufficient to preclude an injunction against its breach.

A distinction is to be observed between cases in which it is sought to enjoin the doing of a particular thing which would violate the defendant's contract, and those in which the plaintiff seeks, in terms, to enjoin the defendant from failing or refusing to perform his contract. There is also a difference between enjoining breach of a contract whose terms are affirmative, and restraining breach of a negative provision in a contract by which the defendant has expressly bound himself not only to do a certain thing, but also not to do a certain other thing.

As has been said, it is one thing to stop a party from doing that which he cannot rightfully do, and another to compel him to do an act involving the exercise of faculties and judgment which are peculiar and personal to himself; and the argument from inconvenience which may properly be invoked when the court is asked to decree specific performance would, if it should be controlling when the court is asked to restrain the doing of an unlawful act, apply to all cases in which the corrective power by injunction is exercised. *Chicago & A. R. Co.* v. *New York, L. E. & W. R. C.* (1885) 24 Fed. 516.

The matter of granting an injunction to protect rights under a contract whose positive terms cannot be specifically enforced is a delicate function whose exercise is particularly suited to the application of the fundamental rule that equity looks at the circumstances of each case and administers equity where it is due, and withholds relief from the inequitable. In this connection it has been stated that in enjoining breach of negative covenants though the positive covenants are incapable of specific performance, the court entertains no idea of indirectly compelling performance of what it could not directly enforce; but that it gives all the relief in its power without looking to the effect that may ultimately be produced by the restraint which it places on the party who is disposed to break his contract, although the effect of such an injunction may in fact be to compel specific performance of the contract. 17 Laws of England (Halsbury) 343.

Judge Lowell said in *Singer Sewing-Mach. Co.* v. *Union Buttonhole & Embroidery Co.* (1873) Holmes, 253, 6 Fisher, Pat. Cas. 480, Fed. Cas. No. 12,904: "This is certainly a subject upon which it is almost impossible to reconcile the decisions, and of such inherent difficulty that I know of no other in which the appellate courts have so often reversed the decisions below. I have examined a great many of the cases, and some apparent contradictions may be understood by recollecting that the granting or refusing an injunction is scarcely

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ever a matter of strict right, and that any attempt to lay down precise and invariable rules on the subject must necessarily fail."

II. Enjoining a specific act.

a. Contract for personal services.

1. Generally.

(a) Containing express negative covenant.

A large number of the cases in which equity has been asked to enjoin breach of contract arose from disputes concerning contracts for personal services. At a comparatively early date equity had refused to decree specific performance of a contract for personal services, both because of the supervision necessary to determine if the defendant performed his duties satisfactorily, and for the better reason, that it was contrary to public policy and the welfare of business, to compel one person against his will to employ or serve another although he had contracted to do so. In this state of affairs equity was asked to exercise its injunctive power to the end that one who had contracted to serve a certain person, and to serve no other during the period covered by the contract, should be restrained from serving any other. Such an injunction was granted in the leading case of *Lumley* v. *Wagner* (1852) 1 DeG. M. & G. 604, 6 Eng. Rul. Cas. 652, in which a noted singer who had contracted to sing in the plaintiff's theater, and not to sing elsewhere during a specified period, was enjoined from singing elsewhere. The court expressly rejected the contention that equity ought not to grant an injunction except in cases connected with specific performance, or in cases where the injunction would complete the whole agreement remaining unexecuted. In rendering the judgment, Lord St. Leonards, while confessing that possibly the injunction might have the practical effect of constraining the defendant to fulfil his engagement, expressly disclaimed any intention on the part of the court of doing by indirection what it could not do directly (*i. e.*, decree specific performance), and laid down the general principle that "wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give." The opinion reviews and explains numerous earlier decisions, and also criticizes, and, it would seem, practically overrules. *Kemble* v. *Kean* (1829) 6 Sim. 333, and *Kimberley* v. *Jennings* (1836) 6

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Sim. 340, 5 L. J. Ch. N. S. 115, which, under like facts, reached a contrary conclusion.

Of the earlier case of *Morris* v. *Coleman* (1812) 18 Ves. Jr. 437, 11 Revised Rep. 230, in which an injunction was granted to restrain the defendant from violating a covenant not to write dramas for other than a certain theater, Lord St. Leonards said in *Lumley* v. *Wagner, supra,* that the contract was such as to render the plaintiff and defendant in the nature of partners in proprietorship of the theater, and that, while the case was decided mainly on the ground of partnership, it was not wholly decided on that ground, and that the same conclusion would have been reached even if there had been no partnership.

Although *Lumley* v. *Wagner* was characterized in *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416, 60 L. J. Ch. N. S. 428, 64 L. T. N. S. 716, 39 Week. Rep. 433, as an anomaly to be followed in cases like it, but not to be extended, it has been regarded as a leading case, and its doctrine is the doctrine of later English and American cases. The doctrine was recognized in the similar case of *Mapleson* v. *Bentham* (1871) 20 Week. Rep. 176, affirmed in 20 Week. Rep. 177, note, but the injunction was denied upon the ground that ambiguity made it doubtful whether the negative covenant covered the period during which the defendant sang elsewhere.

Rolfe v. *Rolfe* (1846) 15 Sim. 88, 1 Coop. t. Cott. 87, note, 10 Jur. 61, involved a dissolution agreement whereby the retiring partner agreed not to engage in a similar business in certain territory, and a further agreement whereby the remaining partner employed the retiring partner so long as the former should run the business, and the latter should diligently devote his time to it. The court said that, though it could not enforce the latter contract, it had power to single out the covenant not to engage in rival business and enforce it.

In *Grimston* v. *Cunningham* [1894] 1 Q. B. 125, an injunction was granted to restrain the defendant from acting at any place other than the plaintiff's theater, where he had contracted to be bound by certain annexed rules and regulations which forbade any member of the troupe to appear at any other theater without permission.

And in *Stiff* v. *Cassell* (1856) 2 Jur. (N. S.) 348, the right to grant an injunction, though specific performance could not have been decreed, was apparently assumed in the case of an author who had agreed to write serial stories for a newspaper for a year, in weekly instalments which were to be paid for by a fixed sum weekly, and stipulated not to write for any other publication sold at less than a certain price.

The principle of *Lumley* v. *Wagner, supra,* was indorsed in *Donnell* v. *Bennett* (1883) 22 Ch. D. 835, 52 L. J. Ch. N. S. 414, 48 L. T.

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N. E. 68, 31 Week. Rep. 316, 47 J. P. 342, declaring that a negative clause might be enforced without regard to whether specific performance could be decreed of the entire contract, but refusing an injunction on other grounds, as will be seen in a later subdivision of this note.

However, the principle of *Lumley* v. *Wagner* has been held not to apply in the case of a covenant which, though negative in form, is positive in substance, and for that reason an injunction has been denied where an employer contracted not to require the employee to leave his employment, except in case of misconduct or breach of contract (*Davis* v. *Foreman* [1894] 3 Ch. 654, 64 L. J. Ch. N. S. 187, 43 Week. Rep. 168, 8 Reports, 725); and where an employee contracted not to give notice of the termination of the contract of services before a certain date (*Kirchner* v. *Gruban* [1909] 1 Ch. 413, 78 L. J. Ch. N. S. 117, 99 L. T. N. S. 932, 53 Sol. Jo. 151).

Though it is now well settled in this country that one who has engaged to serve another for a fixed period may at a proper case be enjoined from serving a third person during that period, some earily American cases, life the English Cases, antedating *Lumley* v. *Wagner* (1852) 1 DeG. M. & G. 604, 6 Eng. Rul. Cas. 652, *supra*, held that an injunction would not be granted even where there was a negative covenant, since breach of contract could not be enjoined where the contract could not be enforced by decree of specific performance. These cases, though practically no longer authority, are shown parenthetically:

(*Burton* v. *Marshall* (1846) 4 Gill, 487, 45 Am. Dec. 171, refused to enjoin an actor who had agreed to act at the plaintiff's theater for a certain time, from acting under any other management. While emphasizing the fact that the contract contained no express negative, the court relied upon *Kimberley* v. *Jennings* and *Kemble* v. *Kean*, *supra*, which as has been shown were disapproved in *Lumley* v. *Wagner*, *supra*);

(Looking with some disfavor upon *Lumley* v. *Wagner*, *supra*, and intimating that the negative covenant should not be enforced when the positive cannot be by specific performance, *Rice* v. *D'Arville* (1895) 162 Mass. 559, 39 N. E. 180, however, went no further than to refuse to enjoin a singer from performing for a third person in violation of an express negative covenant in a contract with the plaintiff, upon the ground that the plaintiff had defaulted in payment of salary before the defendant engaged with the third person, and that his future ability to pay depended upon the success of the season. But it is to be noted that in *Butterick Pub. Co.* v. *Fisher* (1909) 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189, the Massachusetts court expressly indorsed the doctrine of *Lumley* v. *Wagner*, *supra*, in

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enjoining a merchant from violating a covenant not to deal in patterns except those of the plaintiff's make);

(*Hamblin* v. *Dinneford* (1835) 2 Edw. Ch. 529, refused to enjoin an actor from performing at any other theater than the plaintiffs in violation of an express negative covenant, the court saying that specific performance could not be decreed, and that if an injunction should be granted and violated, the defendant would be subject to imprisonment for contempt, thus defeating the very performance sought to be enforced. The court also said that to enforce the negative covenant would leave the positive untouched, and distinguished *Morris* v. *Coleman* (1812) 18 Ves. Jr. 437, 11 Revised Rep. 230, *supra,* upon the ground that that case was decided upon the ground of partnership, a contention, it will be recalled, that was at least partially refuted in *Lumley* v. *Wagner.* The *Hamblin Case* was said in *Pratt* v. *Montegriffo* (1890) 57 Hun, 587, 25 Abb. N. C. 334, 10 N. Y. Supp. 903, to have been practically overruled by later New York cases reaching a contrary conclusion after more deliberate consideration. Such cases are hereinafter shown);

(*Ford* v. *Jermon* [1865] 6 Phila. 6, refused to enjoin an actor from acting for other than the plaintiff— on the authority of *Kemble* v. *Kean* (1829) 6 Sim. 333, *supra,* and early New York cases following it, saying that the fact that amid the multitude of quarrels that have distracted the green room or disturbed the stage, there has been but one instance of interference [*Lumley* v. *Wagner*], may be thought to indicate that it should be regarded as a warning rather than followed as a precedent);

(*Harrisburg Base-Ball Club* v. *Athletic Asso.* (1890) 8 Pa. Co. Ct. 337, refused to restrain a baseball player from playing for other than the plaintiff, upon the ground that the injury to the plaintiff came from the defendant's failure to play for him, and not from his playing for another; that to enjoin the defendant would not benefit the plaintiff unless the indirect effect of the injunction would be to cause the defendant to fulfil his contract; and that since the contract could not be specifically enforced because of nonmutuality, the court ought not to attempt to accomplish the result indirectly by injunction. The court also criticized *Lumley* v. *Wagner*);

But this doctrine was short lived, and the American courts of equity now stand ready in a proper case to enjoin breach of a negative covenant in a contract for personal services, where the fundamental essentials of equitable jurisdiction are present. The considerations of expediency which move equity to refuse a decree of specific performance of a contract for personal services do not prevent it from granting an injunction, where for any reason the plaintiff could not obtain adequate redress in an action at law. *Western U. Teleg. Co.* v. *Union P. R. Co.* (1880) 1 McCrary, 558, 3 Fed. 423; *Western U.*

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Teleg. Co. v. *St. Joseph & W. R. Co.* (1880) 1 McCrary, 565, 3 Fed. 430. For example, dramatic and operatic stars have been enjoined from violating a covenant to act for other than a certain person. *McCaull* v. *Braham* (1883) 21 Blatchf. 278, 16 Fed. 37, following *Lumley* v. *Wagner, supra,* and especially *Daly* v. *Smith* (1874) 49 How. Pr. 150; *Keith* v. *Kellermann* (1909) 169 Fed. 196; *Daly* v. *Smith, supra* (frequently cited as a leading case); *Hayes* v. *Willio* (1871) 11 Abb. Pr. N. S. 167, reversed on other grounds in 4 Daly, 259 (intimating that the contrary is true when the injunction is sought in a suit for specific performance rather than in a suit purely for injunction); *Canary* v. *Russell* (1894) 9 Misc. 558, 30 N. Y. Supp. 122; *Hammerstein* v. *Sylva* (1910) 66 Misc. 550, 124 N. Y. Supp. 535.

This power of injunction is likewise upheld, but in some quarters more reluctantly exercised in the case of baseball players.

Philadelphia Ball Club v. *Lajoie* (1902) 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973, holds that an injunction will issue to prevent a baseball player from violating his contract to serve a certain club for a stipulated time, during which he is not to play for any other club,—where he is an expert player, has been with the club long enough to have become thoroughly familiar with the team work, and is a most attractive drawing card for the public because of his great reputation for ability in his position. The court also held that injunction should not be denied on the ground of want of mutuality, because the option of renewing and terminating the contract on ten days' notice rested only with the employer, where such option expressly formed a part of the consideration for which the compensation was paid,—at least after the contract had been partly performed.

Philadelphia Ball Club v. *Hallman* (1890) 8 Pa. Co. Ct. 57, though recognizing the power of equity to grant an injunction in such a case under proper facts, denied an injunction to restrain a ball player from playing for another in violation of the reserve clause, not only on the ground of nonmutuality, but also on the ground that the reserve clause giving the plaintiff the right to defendant's services for the ensuing year was indefinite in that it specified no salary beyond the provision that it should not be less than that prescribed for the present year. To the same effect is *Metropolitan Exhibition Co.* v. *Ward* (1890) 24 Abb. N. C. 393, 9 N. Y. Supp. 779. See also *Metropolitan Exhibition Co.* v. *Ewing* (1890) 7 L.R.A. 381, 42 Fed. 198, denying an injunction on the ground that the reserve clause gave the plaintiff the right to defendant's services as against other clubs, but did not bind the defendant to enter into a contract for the ensuing year.

The *Lajoie Case, supra,* was disapproved in the like case of *American Base Ball & Athletic Exhibition Co.* v. *Harper* (1902) 54 Cent.

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L. J. 449, decided by the circuit court of the city of St. Louis, upon the ground that such a contract is so lacking in mutuality as to preclude its enforcement by injunction, the court adding that such a contract offended the provisions of the Missouri Constitution that all persons have the natural right of life, liberty, and the enjoyment of the gain of their own industry, that to give security to these rights is the principle of government, and that there can be neither slavery nor involuntary servitude except as a punishment for crime. Even the last case does not deny that equity may have power to grant an injunction in a proper case, and can be regarded as holding only that the case was not a proper one for its exercise.

It is also held that injunction lies to prevent an employee whose position gives him possession of the employer's trade secrets, from violating his contract not to enter the services of a rival concern within the duration of the contract, although the contract also provides that he may be discharged upon thirty days' notice, and he gained a portion of his knowledge of the business before the contract was made. *McCall Co.* v. *Wright* (1910) 198 N. Y. 143, 31 L.R.A.(N.S.) 249, 91 N. E. 516. The court called attention to the difference between an action to compel compliance with an affirmative undertaking to do something, and one brought to restrain violation of a negative covenant not to do something, and added, relative to this question of mutuality, that equity should not refuse to enjoin breach of a negative obligation, merely because the plaintiff had the option of terminating it at any time, since it is no excuse for a violation of the obligation while it lasts that the beneficiary may at some time terminate it. To the report of this case in 31 L.R.A.(N.S.) 249, is appended a note on injunction to prevent an employee from entering the service of a rival, in violation of an agreement, upon the ground that the rival would thus get the benefit of the defendant's knowledge of the plaintiff's business.

In this connection note *Peabody* v. *Norfolk* (1868) 98 Mass. 452, 96 Am. Dec. 664, holding that an employee under contract of service who covenants not to disclose the employer's secret process to others may be enjoined from so doing even though equity would not compel him to serve the employer. The general question of the right to enjoin an employee from disclosing trade secrets is discussed in the notes to *Vulcan Detinning Co.* v. *American Can Co.* 12 L.R.A.(N.S.) 102, and *Stevens & Co.* v. *Stiles,* 20 L.R.A.(N.S.) 933.

As to injunction against breach by employee of agreement not to engage in competing business, see the note to *Simms* v. *Burnette,* 16 L.R.A.(N.S.) 389.

The jurisdiction of equity to enjoin breach of a negative covenant in a contract for personal services is recognized in a number of cases, in which the relief was, however, denied upon various considerations

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which relate to equity's sound discretion, and do not go to the primary question of the jurisdiction to interfere by injunction where specific performance will not be decreed. For instance, a subsequent subdivision of this note shows that the American courts, while not denying equity's power in this respect, largely confine its exercise to cases in which the services are of a peculiar nature. This power to enjoin is also expressly recognized in other cases which deny relief. Thus, the court's power on the proper facts to grant an injunction against breach of a negative covenant is recognized in—

—*Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467, holding that an agreement by an employee not to allow his name to be used in any business similar to that of his employer will not, if the latter does not own the name as a trademark, authorize an injunction against his engaging with his employer's competitors and allowing them to use his name, at least if it is not shown that the employer was or is entitled to use such name, or that the use of it by rivals would do him some special injury;

—*Star Co.* v. *Press Pub. Co.* (1914) 162 App. Div. 486, 147 N. Y. Supp. 579, denying relief upon the ground that there was no affirmative obligation on the defendant's part to serve the plaintiff, as the contract provided that if the defendant should be "unwilling or incapacitated" from performing his contract, the plaintiff would release him from the obligation if he would serve no other in a like capacity for the term covered by the contract; the court said that the negative covenant stood alone, and that there was no consideration to support it;

—*Jackson* v. *Marshall* (1913) 178 Ill. App. 27, refusing to enjoin the defendant from discontinuing the plaintiff's services or putting another in his place, in violation of a stipulation in consideration in a consolidation agreement, to make the plaintiff treasurer of consolidated corporations, and although giving considerable weight to the fact that the plaintiff could not be compelled to serve, apparently placing its decision on the ground that the plaintiff did not agree to act as treasurer, and the corporation did not agree to employ him;

—*Shubert Theatrical Co.* v. *Coyne* (1908) 115 N. Y. Supp. 968, denying a temporary injunction against an actor's breach of covenant to act for none other than the plaintiff, on the ground that the contract was nonmutual and unfair in that the plaintiff was only bound to pay the stipulated salary when the defendant should "actually" publicly perform;

—*Pratt* v. *Montegriffo* (1890) 57 Hun, 587, 25 Abb. N. C. 334, 10 N. Y. Supp. 903, denying relief upon the ground that the plaintiff himself had violated the agreement;

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—*Lawrence* v. *Dixey* (1907) 119 App. Div. 295, 104 N. Y. Supp. 516, denying a temporary injunction on the ground that the contract was indefinite and uncertain as to when the ensuing theatrical season would commence, or as to the obligation of the plaintiff, thus rendering the contract nonmutual;

—*De Rivafinoli* v. *Corsetti* (1833) 4 Paige, 265, 25 Am. Dec. 532, holding that where the time had not come for beginning performance, equity would not decree specific performance of an actor's agreement to perform for the plaintiff, and would not therefore grant a *ne exeat* sought incidentally to specific performance;

—*Peacock* v. *Deweese* (1884) 73 Ga. 570, denying relief on the ground that the contract was voluntary and gratuitous;

—*Healy* v. *Allen* (1886) 38 La. Ann. 867, though not alluding to specific performance, refusing relief on the ground that the remedy at law was adequate.

(b) In absence of express negative covenant.

The English courts were not agreed as to equity's power to assume jurisdiction to prevent an employee from rendering services for a third person, while, although his doing so violated the spirit of his contract with the plaintiff, such contract contained no express negative covenant. There is some conflict on this point, and some of it is due to a misconception of the meaning of a passage in *Lumley* v. *Wagner, supra,* II. a, 1, (a), wherein the court said that, although specific performance could not be decreed, yet in all sound construction and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at any other theater during that period; and that if the defendant had attempted, even in the absence of a negative stipulation, to perform at another theater, she would have broken the contract. This has been improperly relied upon as an intimation that Lord St. Leonards would have granted the injunction if there had been no negative covenant, whereas he expressly said that if he had had only to deal with the affirmative covenant of the defendant to perform at a certain theater he would not have granted the injunction.

Upon such a construction of *Lumley* v. *Wagner* (1852) 1 DeG. M. & G. 604, 6 Eng. Rul. Cas. 652, *supra,* a negative covenant was implied, and breach of it enjoined in *Webster* v. *Dillon* (1857) 3 Jur. N. S. 432, 5 Week. Rep. 867, involving a contract to act at the plaintiff's theater for twelve consecutive nights beginning at a certain date; and also in *Montague* v. *Flockton* (1873) L. R. 16 Eq. 189, 42 L. J. Ch. N. S. 677, 28 L. T. N. S. 580, 21 Week. Rep. 668, relying upon *Webster* v. *Dillon* and enjoining an actor who had agreed to perform for the plaintiff for a season, from acting else-

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where, although there was no negative covenant. On the other hand, apparently regarding it as improper to read a negative covenant into the contract, *Clarke* v. *Price* (1819) 2 Wils. Ch. 157, 18 Revised Rep. 159, refused to enjoin one who had agreed to take notes in a certain court and report cases for the plaintiff, a publisher, from reporting cases for another publisher. This case was said in *Lumley* v. *Wagner, supra,* to have properly refused to imply the negative.

And the cases which are decided upon a misconstruction of *Lumley* v. *Wagner* would seem to have been effectually overruled by *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416, 60 L. J. Ch. N. S. 428, 39 Week. Rep. 433, 64 L. T. N. S. 716, in which the court of appeals expressly called attention to their error, saying that Lord St. Leonards was very clear and explicit on the question, and in which a covenant not to devote time to a rival business was sought to be implied from the defendant's covenant to "give the whole of his time" to the plaintiff's business as manager. The court refused to restrain the defendant, especially as the real object of the injunction was to restrain him from setting up a rival business which the court said he had not promised not to do. But it is to be noted that Lindley, J., recognized that a negative stipulation might be implied and enforced under proper circumstances, by saying that the court should look at the substance of the agreement in each case, and if that would be violated by the act sought to be enjoined, the question should be whether the remedy lies in a court of equity, and, if it does, relief ought not to depend upon the use of a negative rather than a positive form of expression. A similar attitude was taken in *Donnell* v. *Bennett* [1883] 22 Ch. D. 835, 52 L. J. Ch. N. S. 414, 48 L. T. N. S. 68, 31 Week. Rep. 316, and *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* (1873) L. R. 16 Eq. 433, 43 L. J. Ch. N. S. 131.

Whitwood Chemical Co. v. *Hardman, supra,* was followed in *Mutual Reserve Fund Life Asso.* v. *New York L. Ins. Co.* (1896) 75 L. T. N. S. 528, refusing to imply a covenant not to serve any other, from a contract to work exclusively for the plaintiff, the court saying that before an injunction could be granted in such circumstances, there must be a clear and definite negative covenant, or, if one was to be implied, which was said to be quite possible, it must be so definite that the court could see exactly the limit of the injunction to be granted.

Where the defendant agreed to act as manager for the plaintiff's business for fourteen years, but made no negative covenant, it was held that although the court had power to enjoin the defendant from starting a rival business, the power was discretionary and would not be exercised under the facts. *Jackson* v. *Astley* (1883) Cab. & El. 181.

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Radford v. *Campbell* (1890) 6 Times L. R. 488, upheld the refusal of an injunction to restrain a salaried professional football player from breaking an agreement to play solely for the plaintiff during a certain season. It was said by Lord Esher that no question of character or proof of proficiency was involved except so far as the defendant's breach of contract would reduce the gate money; and that the real reason for seeking the injunction was the desire of the plaintiff to win games, which constituted no ground for the intervention of a court of equity.

In a few American cases injunctions were refused where there were no express negative covenants. Thus, *Burton* v. *Marshall* (1846) 4 Gill, 487, 45 Am. Dec. 171, which was decided before *Lumley* v. *Wagner,* emphasized the fact that no express negative covenant was involved, but refused an injunction against an actor upon the authority of *Kemble* v. *Kean* (1829) 6 Sim. 333, *supra,* and *Kimberley* v. *Jennings* (1836) 6 Sim. 340, 5 L. J. Ch. N. S. 115, *supra,* thus apparently indorsing the broad rule of those cases. And *Butler* v. *Galletti* (1861) 21 How. Pr. 465, refused to restrain a danseuse from performing for other than the plaintiff, on the ground that the contract contained no negative clause. But see the New York cases below.

And in a comparatively recent case, *H. W. Gossard Co.* v. *Crosby* (1906) 132 Iowa, 155, 6 L.R.A.(N.S.) 1115, 109 N. W. 483, the court refused, for want of a negative stipulation, to enjoin a traveling demonstrator of corsets from acting for other than the plaintiff, whom she had contracted to serve for a certain period.

But the mere absence of an express negative is generally held in this country not to prevent an injunction where the act sought to be enjoined clearly violates the plaintiff's contractual rights. It is held in New York that an express negative covenant is unnecessary to warrant injunctive relief where an actor agrees to appear in seven performances each week, exclusive of Sundays, since to perform for other than the plaintiff would necessarily be a breach of the contract with the plaintiff. *Duff* v. *Russell* (1891) 28 Jones & S. 80, 14 N. Y. Supp. 134, affirmed without opinion in 133 N. Y. 678, 31 N. E. 622. The court further held that the fact that the contract gave the plaintiff the right to terminate the season with two weeks' notice did not render the contract inequitable, as it did not authorize the discharge of the defendant, but merely involved the termination of the season.

So, *Hoyt* v. *Fuller* (1892) 47 N. Y. S. R. 504, 19 N. Y. Supp. 962, enjoined a danseuse from performing with other than the plaintiff where her contract with him bound her to perform at his theater during "the run" which was continuing at the time of suit, the court saying that the contract was intended to give the plaintiff the

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exclusive services of the defendant, and that in such a case a negative clause was unnecessary.

And *House* v. *Clemens* (1890) 24 Abb. N. C. 381, 9 N. Y. Supp. 484, granted an injunction to a dramatist who had agreed with an author to dramatize the latter's book for a share of the profits, to restrain the author and an adapter from producing another theatrical adaption of the book,—the court saying that a decree to compel the use of the plaintiff's adaption would be impractical. In this case the absence of the negative was not emphasized.

American Association Base-Ball Club v. *Pickett* (1890) 8 Pa. Co. Ct. 232, enjoined the defendant who had agreed to play ball for the plaintiff for seven months, from playing for another during that time, saying that the absence of a negative was immaterial.

Regarding a contract whereby the plaintiff obtained the right to present a play in the defendant's theater, which the latter agreed to furnish, together with light, employees, and advertising, as in the nature of a contract for personal services, *Lacy* v. *Heuck* (1883) 9 Ohio Dec. Reprint, 347, 12 Ohio L. J. 209, enjoined the defendant from permitting the house to be used for other purposes, or from advertising any other play to be performed there, though refusing a mandatory injunction because of equity's inability to supervise the personal services. The court expressly disapproved *Delevan* v. *McCarte* (1847) 1 Ohio Dec. Reprint, 226, 4 West. L. J. 555, refusing to enjoin a celebrated equestrian for performing for other than the plaintiff's circus, which had contracted for his services; and stated that it was decided before *Lumley* v. *Wagner*.

And *Cort* v. *Lassard* (1889) 18 Or. 221, 6 L.R.A. 653, 17 Am. St. Rep. 726, 22 Pac. 1054, recognized the right to an injunction, though denying it because the defendant's services were not shown to be of special, unique, and extraordinary ability, saying that a contract to act at a specified theater at a specified time of necessity involves an agreement not to perform at any other theater during that time.

Taylor Iron & Steel Co. v. *Nichols* (1908) 73 N. J. Eq. 684, 24 L.R.A.(N.S.) 933, 133 Am. St. Rep. 753, 69 Atl. 186, went no further than to say that assuming that equity "will ever enforce by injunction a contract for ordinary personal services," it would be improper under the particular facts of the case to enjoin the defendant from serving another during the period covered by his contract to devote his entire time and skill to the service of the plaintiff. The lower court had refused an injunction upon the ground that there was no negative covenant, and that the defendant's services were not unique and extraordinary. In rendering its decision the appellate court did not allude to the fact that there was no express negative covenant.

However, as will be seen in the next subdivision, this power is not

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usually exercised in this country unless the defendant's services were of such a special or unique character as to render substitution practically impossible.

2. Character of services.

While the American courts, as has been seen, are more liberal than the English in extending the jurisdiction of equity to enjoin breach of a contract for personal services, they have curtailed its exercise. They have extended the jurisdiction to contracts having no express negative covenant, but have largely refused to exercise it in any case unless the services called for by the contract were of a special or peculiar nature. The scope of this note, which is concerned principally with the jurisdiction rather than the discretion of equity, does not include a detailed discussion of the various phases of service involved, but it is proper to point out that the character of the services is the controlling factor in most jurisdictions. Some decisions confine equity's intervention to cases of intellectual service; some make impossibility of substitution the criterion; some say that the service must be individual and peculiar, or special, unique, and extraordinary, or must involve special knowledge, skill, and ability, —but they agree on the general proposition that injunctive relief depends upon the required services being of such a peculiar character that an action at law cannot, according to the various tests imposed, adequately or reasonably compensate the plaintiff in damages for the defendant's nonperformance. *Keith* v. *Kellermann* (1909) 169 Fed. 196 (expert swimmer and diver engaged for exhibition purposes); *Cincinnati Exhibition Co.* v. *Marsans* (1914) 216 Fed. 269 (baseball player); *Roquemore & Hall* v. *Mitchell Bros.* (1910) 167 Ala. 475, 140 Am. St. Rep. 52, 52 So. 423 (contract to load gravel at pit); *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467 (contract for such services as should be devolved upon the defendant by the general manager of the company, including such duties as traveling or acting as secretary or any other officer of the company); *Burney* v. *Ryle* (1893) 91 Ga. 701, 17 S. E. 986 (emphasizing the absence of an express negative in a contract of an insurance agent); *Rabinovich* v. *Reith* (1905) 120 Ill. App. 409 (millinery trimmer); *H. W. Gossard Co.* v. *Crosby* (1906) 132 Iowa, 155, 6 L.R.A.(N.S.) 1115, 109 N. W. 483 (emphasizing the absence of a negative covenant in a contract to demonstrate corsets); *American Base Ball & Athletic Exhibition Co.* v. *Harper* (1902; C. C. St. Louis) 54 Cent. L. J. 449 (baseball player); *Sternberg* v. *O'Brien* (1891) 48 N. J. Eq. 370, 22 Atl. 348 (collector for instalment house); *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, affirmed in 1 Bosw. 227 (artist engaged by photographer to retouch plates); *Pratt* v. *Montegriffo*

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(1890) 57 Hun, 587, 25 Abb. N. C. 334, 10 N. Y. Supp. 903, (actor); *Strobridge Lithographic Co.* v. *Creme* (1890) 58 Hun, 611, 20 N. Y. Civ. Proc. Rep. 24, 12 N. Y. Supp. 898 (involving a contract of the defendant to work for the plaintiff at lithography including coloring sheets, making colors, and working on stone); *Hoyt* v. *Fuller* (1892) 47 N. Y. S. R. 504, 19 N. Y. Supp. 962 (actor); *W. J. Johnston Co.* v. *Hunt* (1892) 66 Hun, 504, 21 N. Y. Supp. 314, affirmed without opinion in 142 N. Y. 621, 37 N. E. 564 (advertising manager); *Roosen* v. *Carlson* (1899) 46 App. Div. 233, 62 N. Y. Supp. 157 (contract of owner of secret formula to associate with manufacturing corporations of which plaintiff furnished the capital); *Universal Talking Mach. Co.* v. *English* (1901) 34 Misc. 342, 69 N. Y. Supp. 813 (making phonograph records and copies thereof, and apparatus); *Dockstader* v. *Reed* (1907) 121 App. Div. 846, 106 N. Y. Supp. 795 (base singer in minstrel quartet); *Hammerstein* v. *Sylva* (1910) 66 Misc. 550, 124 N. Y. Supp. 535 (in which the contract of an opera singer was involved and in which the court cited *Edwards* v. *Fitzgerald,* decided by a Special Term, January 16, 1895, set out in a footnote in 124 N. Y. Supp 539 and holding that the criterion is not whether it is impossible to replace the defendant, but whether he can be readily replaced, and granting an injunction upon the ground that he could not, adding that a contract for exclusive services necessarily implies a negative); *American League Baseball Club* v. *Chase* (1914) 86 Misc. 441, 149 N. Y. Supp. 6 (baseball player); *Magid* v. *Tannebaum* (1914) 164 App. Div. 142, 149 N. Y. Supp. 445 (tailor); *Lasky Feature Play Co.* v. *Suratt & F. Film Corp.* (1915) 154 N. Y. Supp. 974 (moving picture actress); *Columbus Base Ball Club* v. *Reiley* (1891) 11 Ohio Dec. Reprint, 272, 25 Ohio L. J. 385 (ball player); *Cort* v. *Lassard* (1889) 18 Or. 221, 6 L.R.A. 653, 17 Am. St. Rep. 726, 22 Pac. 1054 (acrobats); *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973, (holding in the case of a baseball player that impossibility of obtaining equivalent services from another is not necessary to support an injunction, it being sufficient that no pecuniary standard exists for the measurement of damages); *Columbia College* v. *Tunberg* (1911) 64 Wash. 19, 116 Pac. 280 (music teacher). In *Taylor Iron & Steel Co.* v. *Nichols* (1908) 73 N. J. Eq. 684, 24 L.R.A.(N.S.) 933, 133 Am. St. Rep. 753, 69 Atl. 186, an injunction having been denied below on the ground, among others, that the contract did not call for special, unique, and extraordinary services, it was held that the special circumstances of the case forbade an injunction, even assuming that equity will ever enforce by injunction a contract for ordinary personal services. But the appellate court did not discuss the nature of the services.

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De Pol v. *Sohlke* (1867) 7 Robt. 280, assumed that equity had power to enjoin a danseuse of superior ability from violating a covenant to dance for none other than the plaintiff, but denied a temporary injunction for want of showing of damages to the plaintiff, who had no theater in active operation. And in some of the other preceding cases in which the nature of the services were commented on, the decision is placed on other grounds. And in others the court discusses the nature of the services, but grants an injunction upon the ground that the services called for by the contract are of such a nature as to warrant equitable intervention.

b. Other contracts.

1. Generally.

In *Hills* v. *Croll* (1845) 2 Phill. Ch. 60, 1 Coop. t. Cott. 84, note, 14 L. J. Ch. N. S. 444, 9 Jur. 645, 1 DeG. M. & G. 627, note, injunctive relief was denied with respect to a covenant to buy from none other than the plaintiff, in a contract under which the defendant gave the plaintiff a certain sum and agreed to purchase all acids required for the use of his patented process from the plaintiff, who covenanted to furnish the same. Though it appeared that the plaintiff had performed his part of the agreement to date, the injunction was denied upon the ground that he could not be compelled to perform in the future, and that therefore, if the defendant should be enjoined from procuring the goods elsewhere, the defendant's business would be ruined if the plaintiff should thereafter break his contract. The reporter says in a footnote to this case in 2 Phill. Ch. 62, that the court appears to have overlooked the distinction between contracts which remain wholly executory, and those which have been acted upon to such an extent as to give the actor an equity arising from part performance, to insist upon an adherence to its terms by the other. The reporter further says, that inasmuch as that question and the exercise of discretion connected with it appeared to have been excluded by the court, the decision, whether right or wrong in the result, cannot furnish any guide in similar cases; and that on that account the case was not reported until its citation in *Dietrichsen* v. *Cabburn* (1846) 2 Phill. Ch. 52, 1 Coop. t. Cott. 72, 10 Jur. 60, rendered some notice of it necessary. That case, in keeping with the distinction just mentioned, enjoined breach of a manufacturer's covenant not to furnish goods at less than a fixed price to other than the plaintiff, whom he had contracted to furnish with certain products at a price less than that specified in the above negative covenant, while the plaintiff was bound only to sell the goods and remit the agreed price. The plaintiff showed that he had

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performed his part of the agreement. In granting the injunction the court said that the principle that an injunction would not be granted when the court was without power to enforce the positive agreement had reference to cases in which complete performance of the contract was impossible, and did not operate to prevent the relief merely because the court had not jurisdiction of the plaintiff's acts, against whom no equities were to be administered; as, for example, in the case under consideration, where the plaintiff had performed every act required of him by the agreement. The cases of *Morris* v. *Coleman* (1812) 18 Ves. Jr. 437, 11 Revised Rep. 230, and *Clarke* v. *Price* (1819) 2 Wils. Ch. 157, 18 Revised Rep. 159 (which are referred to above in connection with contracts for personal services), were cited as conclusive on the point, the court saying that the latter denied relief for want of an express negative, but would have granted an injunction if there had been a negative. In justification of *Hills* v. *Croll, supra,* the point suggests itself that the plaintiff's obligation was greater than in *Dietrichsen* v. *Cabburn,* in that he agreed to furnish all the acids required by the defendant, and thus virtually obligated himself to purchase the same in the market for delivery to the defendant, if he was unable to manufacture enough. This he could not be required to do. Therefore it would seem that if the argument of nonmutuality is ever applicable in a suit for injunction to restrain breach of an express negative covenant, it applies in this case.

It is to be noted that in the *Dietrichsen* and *Hills Cases,* the negative covenants were express. With reference to implied negatives it is said in 17 Laws of England (Halsbury) 244, that the law is in rather an indefinite state as to when an injunction to restrain breach of covenant ought to be refused on the ground that specific performance is impossible; and that there is no distinct line to be found in the authorities, dividing the class of cases in which the court, feeling that it has no power to decree specific performance, nevertheless grants an injunction to restrain the breach of one or more of the stipulations, from the class of cases in which it declines to interfere. But such a statement seems too sweeping, for the cases clearly seem, for the most part, to follow distinct lines, which, though leaving something to be desired, serve to justify the statement that there is no serious conflict. It is also to be observed that, while the presence of an express negative covenant is generally a considerable factor in constraining a court to interfere, the courts have occasionally manifested a disposition to grant an injunction where it would work equity,—irrespective of whether the contract contained an express negative or not. For instance, *Whitwood Chemical Co.* v. *Hardman, supra,* II. a, 1 (b) and *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co. infra,* II. b, 3, lean in this direction, and there is an *obiter*

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statement to that effect in *Donnell* v. *Bennett* (1883) 52 L. J. Ch. N. S. 414, 22 Ch. D. 835, 48 L. T. N. S. 68, 31 Week. Rep. 316, citing *Dietrichsen* v. *Cabburn, supra,* with approval, and involving a contract of a fish curer to sell all fish refuse to a certain manure manufacturer for a certain time, and a further covenant to sell to no other manufacturer. In granting the injunction the court, although confessing that the case was difficult to decide in the state of the law, declared that the tendency of recent decisions was that the court ought to look at the nature of the contract, and that if the contract as a whole is the subject of equitable jurisdiction, and injunction may be granted irrespective of the existence of an express negative; and that if a breach can be satisfied by damages, equity ought not to interfere by injunction even though the covenant is express. (However, the fact that, in America at least, the courts generally are far more likely to intervene, where the negative covenant is express, becomes apparent upon a survey of the cases in subdivision II. b, 2, below.)

On the other hand, no express negative, although the word "exclusive" would seem to be of equal force, was involved in *Baldwin* v. *Society for Diffusion of Useful Knowledge* (1838) 9 Sim. 393, 2 Jur. 961, in which the defendants had given the plaintiffs the exclusive right to publish maps from drawings furnished by the defendants. An injunction to restrain the defendants from furnishing drawings to others was, on the authority of *Clarke* v. *Price, supra,* denied upon the ground that the defendants could not be compelled to furnish the drawings. Of course no injunction was granted where the plaintiff's remedy at law was sufficient, a condition which precludes equitable relief in any form. Thus, in *Fothergill* v. *Rowland* (1873) L. R. 17 Eq. 132, 43 L. J. Ch. N. S. 252, 29 L. T. N. S. 414, 22 Week. Rep. 42, involving a contract to sell the plaintiff the exclusive output of goods during a fixed period and at a specified price, the court, while frowning upon the general practice of granting injunctions where specific performance could not be decreed, refused to enjoin the defendant from selling to other persons, substantially upon the ground that the adequacy of the plaintiff's remedy at law for damages, being sufficient to preclude a decree requiring the defendant to produce and deliver the goods, was sufficient to preclude an injunction against delivery to other persons.

And there are American cases which deny relief upon grounds which have no peculiar relation to the present question. As examples of such contracts reference may be had to *South Chicago City R. Co.* v. *Calumet Electric Street R. Co.* (1898) 171 Ill. 391, 49 N. E. 576, in which the contract was held void as against public policy; *Platte County Independent Teleph. Co.* v. *Leigh Independent Teleph. Co.* (1908) 80 Neb. 46, 116 N. W. 511, former hearing 80 Neb. 41, 113

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N. W. 799, in which the contract was indefinite and uncertain; *Hazard* v. *Hope Land Co.* (1908) — R. I. —, 18 L.R.A.(N.S.) 293, 69 Atl. 602, in which a vote of the defendant's directors was held not a completed contract, but merely a preliminary to a contract; *Lackawanna Coal & Iron Co.* v. *Long* (1910) 231 Mo. 605, 133 S. W. 35, in which the petition was held insufficient to allege ownership in a vendor to warrant specific performance on his contract to convey, or an injunction against conveying to anyone else; *Seattle Electric Co.* v. *Snoqualmie Falls Power Co.* (1905) 40 Wash. 380, 1 L.R.A. (N.S.) 1032, 82 Pac. 713, holding that although equity will not specifically enforce a contract to furnish electricity to a street car and electric lighting company, which creates a monopoly contrary to the terms of a franchise given the power company, it may enjoin breach of the contract until such time as an adequate supply can be procured elsewhere, where such breach will result in great public inconvenience; *Steinau* v. *Cincinnati Gaslight & Coke Co.* (1891) 48 Ohio St. 324, 27 N. E. 545, in which the court, although inclining to the view that an injunction should not be granted as specific performance could not be decreed, denied an injunction upon the ground that the plaintiff had an adequate remedy at law; and *Lanston Monotype Mach. Co.* v. *Times-Dispatch Co.* (1914) 115 Va. 797, 80 S. E. 736, in which an injunction was likewise denied upon the ground of the adequacy of the remedy at law, but in which the court recognized it as a general rule that an injunction will not be granted to restrain a defendant from violating negative covenants in an agreement incapable of specific enforcement, where specific performance is the object of the suit, but declaring that where the object of the suit is not to enforce specific performance of the agreement which contains both affirmative and negative covenants, breach of the negative may be enjoined in a proper case although the affirmative could not be enforced.

It is expressly provided by statute in Louisiana that "if the obligation be not to do, the obligee may also demand that the obligor be restrained from doing anything in contravention of it, in cases where he proves an attempt to do the act covenanted against." This provision was applied in *Algiers R. & Lighting Co.* v. *New Orleans R. & Light Co.* (1915) — La. —, 68 So. 960, involving a contract by a company engaged in the generation of electric current, to sell another company all the current it needed, and not to sell to any other person or corporation within a specified area.

2. Where plaintiff's obligation executory.

Where the suit was to enjoin the doing of a particular act, and the plaintiff's remedy at law did not appear to be sufficient, the refusal of an injunction was, conformably to the distinction pointed out

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in the discussion of *Hills* v. *Croll,* in the preceding subdivision, practically confined to cases in which the plaintiff had not performed his agreement. Thus, it was held in *Peto* v. *Brighton, U. & T. W. R. Co.* (1863) 1 Hem. & M. 468, 32 L. J. Ch. N. S. 677, 11 Week. Rep. 874, 9 L. T. N. S. 227, that a railway company which engaged a contractor to construct the road, and agreed to pay him in debentures and shares of the company, could not be enjoined from transferring the shares to others while the plaintiff's contract remained unperformed. A fact which apparently influenced the court to some extent in refusing to exercise its discretion favorably to the injunction is the circumstance, emphasized by the court, that if the defendant should be enjoined from transferring the shares and debentures, and the plaintiff should later refuse to perform, the securities might have depreciated in the meantime; and that in such a case the fact that, if the plaintiff should fail to perform, the injunction against defendant would be determined, was no argument to support the intervention of equity.

And the American cases are found to reach a like result where there is no express negative, and the plaintiff's unenforceable contract is either wholly executory, or, if partially performed, is such that the damages would be incapable of definite ascertainment. In such a case the argument of nonmutuality prevails, and the court refuses to grant the injunction, especially where the question of mutuality relates to the obligations, and not merely to the remedy. This fact is illustrated by the two phases of the case of *Great Northern R. Co.* v. *Sheyenne Teleph. Co.* (1914) 27 N. D. 256, 145 N. W. 1062, applying the doctrine that while equity will not decree specific performance of a nonmutual contract, it will indirectly affect the same result, where possible, by merely restraining breach of its negative covenants. Here an injunction was granted to restrain a telephone company from removing a telephone which it had placed in a railroad station under a contract with the railway company that, in consideration of the privilege of placing it in the station, the railroad should have free service, the contract to continue for five years, when either party might cancel the same on thirty days' notice. But an injunction was denied in the case of a station at which the telephone company had contracted to furnish free service so long as it should maintain its exchange in town, where only the railroad company had the privilege of terminating the contract, the court saying that the inadequacy of consideration, possible length of term, and want of mutuality, taken together, rendered the contract invalid and unenforceable.

Strang v. *Richmond, P. & C. R. Co.* (1900) 41 C. C. A. 474, 101 Fed. 511, refused to enjoin a railroad company from disposing of bonds appropriated by contract to payment for construction of its

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road, upon the ground that as specific performance of the contract could not be enforced, the injunction sought could not be granted while the plaintiff's contract remained unperformed. In the similar case of *Peto* v. *Brighton, U. & T. W. R. Co. supra,* the court pointed out that another reason for refusing an injunction in such a case was the fact that if the injunction should be granted, and the plaintiff should not perform its contract, the securities might depreciate and thus cause loss to the defendant.

A daily newspaper contracting for exclusive Associated Press service so long as the former should continue to act as correspondent for the associated press, was denied an injunction to restrain the Associated Press from furnishing despatches to other papers, in *Iron Age Pub. Co.* v. *Western U. Teleg. Co.* (1887) 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449, upon the ground that, specific performance being impossible because of lack of mutuality, the only decree available would be an unqualified injunction against the Associated Press, which would be inequitable in view of the right of the plaintiff to terminate its contract at any time; or an injunction to remain in force so long as the plaintiff should perform his contract; such being impracticable by reason of the likelihood that the court would be frequently called upon to determine whether the plaintiff had complied with his obligations, which involved the exercise of special skill and knowledge indefinitely.

In *Pingle* v. *Conner* (1887) 66 Mich. 187, 33 N. W. 385, it appeared that several hotel proprietors sold their buses and teams to the plaintiff, who agreed that for a term of five years he would carry guests to and from their hotels, they agreeing not to run any buses, and not to be interested in opposition to the plaintiff's business under the contract, and not to employ runners for their respective hotels. An injunction against breach of the negative covenant by one hotel proprietor was denied, the court saying that specific performance could not be decreed mutually and completely, since the tenure of some of the hotel proprietors was such as to make it impossible to carry out their agreements for the full term, and that an injunction against the defendant would be a hardship if other proprietors could with impunity start to run free buses.

Perrin v. *Smith* (1909) 135 App. Div. 127, 119 N. Y. Supp. 990, refused one who had agreed with an inventor to interest capital for the formation of a corporation to manufacture the invention, an injunction to restrain the inventor and capitalists interested by the plaintiff, who had agreed to form a corporation giving the plaintiff an interest and office at a fixed salary, from forming another corporation excluding the plaintiff. The court pointed out that there was no negative covenant, and further that an injunction was sought as incidental to specific performance of the agreement to form a cor-

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poration giving the plaintiff an office, and that as specific performance could not be decreed of such a contract, an injunction could not be granted.

However, in cases of express negative covenants, the American courts are found to grant relief, although the plaintiff's obligation is executory, or, if performed to date, is such that the damages cannot be accurately ascertained for its future breach.

Thus in *Singer Sewing-Mach. Co.* v. *Union Button-hole & Embroidery Co.* (1873) Holmes, 253, 6 Fisher, Pat. Cas. 480, Fed. Cas. No. 12,904, involving a contract of the owner of patents to make the plaintiff his exclusive agent for the sale of the machines, and not to furnish machines to others,—the court enjoined the defendant corporation from dissolving, and its assignee with notice from transferring the machines, though the court said that specific performance could not be decreed because of lack of mutuality. The court relied upon *Dietrichsen* v. *Cabburn* (1846) 2 Phill. Ch. 52, 1 Coop. t. Cott. 72, 10 Jur. 60, *supra,* and said that it practically overruled *Hills* v. *Croll* (1845) 2 Phill. Ch. 60, 1 Coop. t. Cott. 84, note, 14 L. J. Ch. N. S. 444, 9 Jur. 645, 1 DeG. M. & G. 627, note, *supra.* The court in reaching its conclusion said: "The contract contains in itself . . . not only executory agreements on both sides, but a present grant for value of the exclusive right to sell; and my present impression is that such a grant is good, and is to be enforced, so long as it lasts, whether the remainder of the contract is mutual or not, provided the whole contract, including the grant, is not so unequal as to be void in a court of equity." This case was followed in the like case of *Brush-Swan Electric Co.* v. *Brush Electric Co.* (1890) 41 Fed. 163.

Standard Fashion Co. v. *Siegel-Cooper Co.* (1898) 157 N. Y. 60, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408, holds that an injunction will lie to prevent a department store from violating its contract with one occupying floor space for the sale of a particular article, on a profit-sharing basis, not to allow any other make of such article to be sold on the premises during the period covered by the contract. The court said that the bill stated a good cause for specific performance, but the same could not be decreed in such a case because it would entail protracted supervision, which equity does not undertake.

Under similar facts it was held in *Butterick Pub. Co.* v. *Fisher* (1909) 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189, that specific performance by injunction of a negative covenant will not be denied in a proper case merely because an affirmative covenant with which the negative is allied is in kind one which a court of equity does not specifically enforce.

So, in *Butterick Pub. Co.* v. *Rose* (1910) 141 Wis. 533, 124 N.

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W. 647, an injunction was granted to restrain the defendant from violating a covenant not to sell patterns of any other make, the court saying that by making the defendant its agent, the plaintiff impliedly covenanted to furnish the patterns, thus giving the contract mutuality, and that although specific performance could not be decreed, an injunction was proper, and mutuality of remedy was not also necessary.

Lowenbein v. *Fuldner* (1893) 2 Misc. 176, 21 N. Y. Supp. 615, affirmed without opinion in 143 N. Y. 639, 37 N. E. 823, enjoined breach of a manufacturer's stipulation to make certain articles for the plaintiff, and not otherwise, without alluding to the question of specific performance.

Southern Fire Brick & Clay Co. v. *Garden City Sand Co.* (1906) 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 Ann. Cas. 50, enjoined the owner of land who had contracted to furnish fire clay to the plaintiff for a period of eight years, from violating a covenant not to furnish fire clay to other than the plaintiff, nor to operate a plant elsewhere in the state,—following *Lumley* v. *Wagner* (1852) 1 DeG. M. & G. 604, 6 Eng. Rul. Cas. 652, *supra*.

Banker v. *Stimson* (1891) 61 Hun, 626, 40 N. Y. S. R. 740, 16 N. Y. Supp. 60, enjoined a factory owner from manufacturing bicycles for other than the plaintiff in violation of a covenant to manufacture bicycles for the plaintiff "and for itself alone."

Anheuser-Busch Brewing Asso. v. *Dwyer* (1909) 150 Ill. App. 315, enjoined a lessee from using beer not manufactured by the plaintiff, in violation of a negative covenant in a contract of lease where he covenanted to use no other beers. Here the court said that as the negative covenant was express no question of specific performance was involved.

Joseph Schlitz Brewing Co. v. *Travi* (1913) 179 Ill. App. 269, held a brewer entitled to an injunction against a saloon keeper's breach of his negative covenant not to use beer other than that manufactured by the plaintiff, who agreed to furnish it, and who loaned the defendant saloon fixtures as part of the agreement for use in the saloon. However, without reference to this case, which was decided by the appellate court for the second district, the court for the first district refused, in *Bartholomae & R. Brewing & Malting Co.* v. *Modzelewski* (1913) 183 Ill. App. 352, to enjoin breach of a negative covenant under precisely similar facts; and while the court used language calculated to discredit the *Travi Case*, the real ground of the decision in the later case seems to be that the contract involved contained a provision for stipulated damages in case of the defendant's breach of his negative covenant.

Beck v. *Indianapolis Light & P. Co.* (1905) 36 Ind. App. 600, 76 N. E. 312, enjoined the breach of a negative covenant in a con-

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tract by which the defendant agreed to take electric current from the plaintiff, and not to use current from any other source for five years. Here the court said that it was proper to require the defendant to carry out the terms of his express contract or to lose the benefit of its breach.

In *Myers* v. *Steel Mach. Co.* (1904) 67 N. J. Eq. 300, 57 Atl. 1080, affirmed in 68 N. J. Eq. 795, 64 Atl. 746, a machine manufacturer was enjoined from violating a covenant not to furnish machines to other than the plaintiff, in a contract by which the defendant agreed to furnish its output of machines to the plaintiff, and to no one else unless the plaintiff should fail to take the entire output,—although specific performance could not have been decreed, because the contract involved continued exercise of skill in manufacture of workable machines.

Montgomery Light & P. Co. v. *Montgomery Traction Co.* (1911) 191 Fed. 657, enjoined a street railway company from taking current from other than a power company from which it had contracted to take power exclusively during a term of years. Though specific performance could not be decreed, the court seemed to regard the word "exclusively" as a negative covenant not to take electricity from others, which could be singled out and enforced by injunction. This case was affirmed in 219 Fed. 963, in which the court said: "Whether or not a court of equity will by injunction restrain the violation of negative stipulations in a contract (in the instant case, enjoin the respondent from taking current from any source except the complainant), where the affirmative covenants are of such a nature that they cannot be specifically enforced, is sometimes a difficult question, and it is not an easy matter to reconcile the decisions in adjudicated cases. . . . I am convinced that the bill in this case contains equity, and that, if the evidence sustains the facts averred therein, the complainant must be granted the injunctive relief prayed for."

Chicago & A. R. Co. v. *New York, L. E. & W. R. Co.* (1885) 24 Fed. 516, held that although specific performance could not be decreed because it would entail supervision, a railway company could be enjoined from diverting through traffic from another road in violation of an agreement for the formation of a co-operative organization for the routing of through freights between ports reached by their respective lines. Although the opinion contains no allusion to performance by the plaintiff, which forms the basis of a decision in *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* (1873) L. R. 16 Eq. 433, 43 L. J. Ch. N. S. 131, *supra,* the court cited and relied upon that case as quite "in point."

On the other hand, *Berliner Gramophone Co.* v. *Seaman* (1901) 49 C. C. A. 99, 110 Fed. 30, refused to enjoin a sale of gramophones

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to other than the plaintiff in violation of an express negative covenant in a contract whereby the defendant gave the plaintiff exclusive agency for the sale of gramophones and supplies for fifteen years. The court declared it outside the functions of equity to supervise continuing contracts, and to see that both parties fulfilled the covenants to the end.

3. Where plaintiff has performed.

The English courts have frequently enjoined the defendant from doing a specified act in violation of his contract although it contained no negative covenant. But in all of them it appeared either that the plaintiff had fully performed his contract, or else that, where the contract was a continuous one, the plaintiff had performed so far as possible, and that his contract was such that any future violation could have been adequately and accurately redressed by an action at law for damages. Thus *Catt* v. *Tourle* (1869) L. R. 4 Ch. 654, 38 L. J. Ch. N. S. 665, 21 L. T. N. S. 188, 17 Week. Rep. 939, held a brewer who conveyed land under a covenant that he should have "the exclusive right" of supplying malt liquors to any inn or public house erected thereon was entitled to an injunction against another brewer who acquired the land and supplied the inn with beer, etc., of his own make. It is to be observed that the plaintiff had executed his side of the agreement by conveying the land.

And in *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* (1873) L. R. 16 Eq. 433, 43 L. J. Ch. N. S. 131, the plaintiff had made an agreement (confirmed by Parliament) to construct a railroad, and the defendant agreed to work it, carrying specified traffic thereby, and not by the defendant's competing lines, the agreement to continue for 999 years. In enjoining the defendant from diverting traffic the court said that the difference between express and implied negative covenants was more imaginary than real, and that the safer rule would be to look at the substance of the agreement in each case. Accordingly, the court said that the equities were in favor of the plaintiff, who had performed its part of the agreement by constructing the railroad, and putting the defendant in possession, and that, being in possession for 999 years under a parliamentary agreement, the defendant might be enjoined from using the premises in violation of the agreement. With respect to its view that the substance, and not the form, of the contract should be looked at, the language of the court was quoted with approval in the *Metropolitan Electric Supply Co.* v. *Ginder* [1901] 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. N. S. 862, 84 L. T. N. S. 818, 49 Week. Rep. 508, 17 Times L. R. 435, involving the defendant's contract to take from the plaintiff all of the electric energy required upon the defendant's

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premises, the court saying that the essence of this contract was negative (*i. e.*, that he would not take from others), and that he made no affirmative contract to take any energy, agreeing only that he would take what he required from the plaintiff. In other words the defendant was at liberty to use other forms of energy derived from other sources, but if he used electricity at all he was bound to take it from the plaintiff.

See also *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1901] 2 Ch. 37, 70 L. J. Ch. N. S. 468, 49 Week. Rep. 418, 84 L. T. N. S. 436, 17 Times L. R. 410, enjoining one landowner from selling his premises without giving an adjoining owner the first refusal, which the former had stipulated to give the latter in a contract settling disputes between the two.

A covenant to carry coal for no one else was implied from a provision in a charter party binding a vessel to carry a full cargo for a shipper; and it was said, *obiter,* that the vessel owner could be enjoined from carrying freight for other persons. *De Mattos* v. *Gibson* (1859) 4 DeG. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. N. S. 165, 498, 7 Week. Rep. 100, 403, 514. It is to be observed that the cargo had gone to sea, the shipper having complied to date with his contract as to paying freight, but the ship was disabled and put in at a port of haven and unloaded for repairs. After a considerable delay this suit was brought. So, it appears that the only breach that the plaintiff could be guilty of would be nonpayment of the remainder of the freight, which could be amply remedied by an action for damages. This case was referred to in the similar case of *Sevin* v. *Deslandes* (1860) 30 L. J. Ch. N. S. 457, 7 Jur. N. S. 837, 9 Week. Rep. 218, in which the contract that the vessel would not carry for others was express, and in which the court granted the injunction.

And in the similar case of *Heriot* v. *Nicholas* (1864) 12 Week. Rep. 844, *De Mattos* v. *Gibson, supra,* was cited by counsel, and the court apparently took it for granted that an injunction was proper, but made it temporary only pending an inquiry into the question whether, by unshipping, the coal became unfit to reship by reason of danger from spontaneous combustion.

So, in *Messageries Imperiales Co.* v. *Baines* (1863) 7 L. T. N. S. 763, 11 Week. Rep. 322, following *De Mattos* v. *Gibson, supra,* a shipowner was restrained from interfering with the sailing of a ship in violation of a charter party.

Keith v. *National Teleph. Co.* [1894] 2 Ch. 147, 63 L. J. Ch. N. S. 373, 8 Reports, 776, 70 L. T. N. S. 276, 42 Week. Rep. 380, 58 J. P. 573, 42 Week. Rep. 380, though confessing inability for lack of supervisory powers to compel a telephone company to maintain wires, instruments, etc., in conformity with a contract of a customer,

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enjoined it from cutting wires and terminating the service in violation of the customer's contract rights.

And in American cases in which injunctions were granted, it appeared that the plaintiff's contract was executed, or at least performed to date with an outlay of expense looking to performance in the future.

Thus, *American Electrical Works* v. *Varley Duplex Marget Co.* (1904) 26 R. I. 295, 58 Atl. 977, 3 Ann. Cas. 975, enjoined a patentee from removing a machine from the plaintiff's mill in violation of a contract, though specific performance could not be decreed, the court saying that the damages were incapable of estimation, and that an injunction would not necessarily work specific performance, but was simply to prevent the defendant from doing acts which would lessen or destroy executed contractual rights acquired by the plaintiff.

An injunction was granted although specific performance could not have been decreed, where the plaintiff and defendant, adjusting conflicting patents and infringements, agreed that the defendant should not manufacture electric controllers of certain type, but sell exclusively those manufactured by the plaintiff, who agreed to furnish them; and the plaintiff likewise agreed not to manufacture certain trolley poles and not to sell any except those manufactured by the defendant, who agreed to supply plaintiff's demand therefor; and where the plaintiff had performed its agreement, ceasing the manufacture of the trolley poles, and going to great expense to prepare for the manufacture of controllers to supply the defendant. *General Electric Co.* v. *Westinghouse Electric Co.* (1907) 151 Fed. 664 (see former appeal 144 Fed. 458, where an injunction was denied for want of essential allegations of fact). In restraining defendant from manufacturing controllers the court pointed out that under the contract either party might, if the other failed to manufacture and furnish the devices which he had undertaken to furnish to the other, manufacture them himself; and that the negative covenants were separable and were enforceable on the part of one party, so long as the other had performed his contract to date and stood ready to do so in the future. On the authority of this case an injunction was granted in *Reece Folding Mach. Co.* v. *Earl & Wilson* (1913) 205 Fed. 539, to restrain the lessee of patented machines from making and installing machines of its own in violation of a covenant in the lease, not to infringe any of the patents, or contest their validity or the plaintiff's title thereto.

A statutory provision that an injunction will not be granted to prevent breach of a contract the performance of which cannot be specifically enforced does not apply where a lessor of a dairy, including live stock and implements, is proceeding to sell the live stock and implements, although the lessee has taken possession,

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and an injunction against such sales will be granted, since the lessor would have no adequate remedy at law, and especially since the acts complained of would be a trespass resulting in irremediable damage. *Morris* v. *Iden* (1913) 23 Cal. App. 388, 138 Pac. 120.

Where the owner of a plot of building lots, in order to enhance the value of the property, conveyed a parcel to another, and agreed to furnish sufficient natural gas from a well owned by the grantor, to operate an electric light plant, so long as the well should supply enough, and the grantee agreed to build and did build the plant on the parcel,—it was held that the contract was not so vague and uncertain as to prevent the issuance of an injunction to restrain the grantor from discontinuing the supply of gas; and although specific performance might not be decreed, the injunction would be granted where there was no other source from which the grantee could obtain gas to operate his plant. *Xenia Real Estate Co.* v. *Macy* (1897) 147 Ind. 568, 47 N. E. 147. The court added that the same would be true if the service had already been disconnected, as a mandatory injunction to compel its re-establishment will issue for a like reason.

A grantee of the exclusive right to take gravel and sand from a tract of land for a certain time, and to deliver to the grantor a certain amount of the product per day, was enjoined from violating a further covenant not to sell the product except to the grantor,—in *American Sand & Gravel Co.* v. *Chicago Gravel Co.* (1914) 184 Ill. App. 509, decided on the authority of *Southern Fire Brick & Clay Co.* v. *Garden City Sand Co. supra,* II. b, 2, which, however, did not involve a grant of the premises from the plaintiff to the defendant as in the *Amercian Sand & Gravel Co. Case.*

III. Comprehensive injunction against "breach."

Where the suit is brought, not to prevent a specific act as in the preceding cases, but to obtain an injunction which is broad enough to embrace any breach of the defendant's affirmative contract, the courts uniformly deny relief. That is to say, where the plaintiff seeks, in terms, to enjoin "breach" of the defendant's affirmative contract, or prays for an injunction in terms of the affirmative covenant with a negative word inserted, the suit is regarded as substantially one for specific performance, and is tested by the same rules. Thus, *Hooper* v. *Broderick* (1840) 11 Sim. 47, 9 L. J. Ch. N. S. 321, refused to restrain a lessee of an inn who had covenanted to keep the same open during the term, from discontinuing its use as an inn, since an injunction in such terms would be in effect ordering the defendant to carry on the business of innkeeper.

And *Kingston* v. *Kingston, P. & C. Electric R. Co.* (1898) 25 Ont. App. Rep. 462, refused to enjoin a street railway company from

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operating its cars otherwise than in accordance with its contract with the city, as a means of compelling it to run its cars according to agreed schedule on a certain street. The court said that specific performance could not be decreed because of the supervision that the decree would entail, and that no negative could be implied, where, as here, the course of the defendant was not some positive act in violation of the agreement, as in *Lumley* v. *Wagner* (1852) 1 De G. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652, but was a case of falling short of performing the full obligation which it undertook.

Phipps v. *Jackson* (1887) 56 L. J. Ch. N. S. 550, 35 Week. Rep. 378, refused to enjoin breach of a provision in a farm lease, that the tenant would keep the proper number of sheep, horses, and cattle,—upon the ground that it could not specifically enforce the agreement because unable to supervise its performance. The court said that where there is an express negative covenant in a lease, or where the court sees that a single act of the tenant is in direct violation of a covenant which necessarily entails a negative, an injunction will be granted; but that it will not be granted where to do so would be to enforce and supervise continuous acts covered by the stipulation.

So, a contractor who undertook the construction of a railway, stipulating that if he did not proceed with the work as required by the railroad company's engineer, the latter should have the option of terminating the contract and declaring the contractor's materials and implements forfeited,—was denied an injunction to restrain the company (which had declared a forfeiture), from taking possession of tools and implements, the ground of the decision being, among others, that such relief would be analogous to specific performance, which could not be decreed because equity could not supervise. *Munro* v. *Wivenhoe & B. R. Co.* (1865) 11 Jur. N. S. 613, 4 DeG. J. & S. 723, 12 L. T. N. S. 655, 13 Week. Rep. 880, following *Johnson* v. *Shrewsbury & B. R. Co.* (1853) 3 DeG. M. & G. 914, 22 L. J. Ch. N. S. 921, 17 Jur. 1015, denying the right of one who contracted to operate and maintain a railroad for a certain period, unless the contract should be terminated by the railroad company for disobedience of instructions, to enjoin the company from terminating the contract for nonconformity to unreasonable instructions,—upon the ground that the plaintiff could not have been compelled to perform his contract.

Horne v. *London & N. W. R. Co.* (1861) 10 Week. Rep. 170, refused to enjoin a railroad company from terminating an agreement whereby the plaintiff engaged to load, unload, and deliver freight and collect charges, etc. Following *Johnson* v. *Shrewsbury & B. R. Co. supra.*

Pickering v. *Ely* (1843) 2 Younge & C. Ch. Cas. 249, 7 Jur. 479, 12 L. J. Ch. N. S. 271, refused to restrain a bishop from obstructing

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the plaintiff in the performance of his duties under a contract by which the bishop's predecessor employed the plaintiff for life as a receiver of the issues and profits of the See,—upon the ground, among others, that the plaintiff could not be compelled specifically to perform his agreement, and that the relief sought, being analogous to specific performance, could not be granted.

And *Stocker* v. *Brockelbank* (1851) 3 Macn. & G. 250, 20 L. J. Ch. N. S. 401, 15 Jur. 591, denied an injunction to restrain an employer from terminating the services of managers who agreed to manage the business for a share of the profits, the employer stipulating that the contract should be irrevocable except for breach of covenant by the managers. The court said that the injunction could be granted only by way of specific performance, and that a contract for personal services could not be specifically enforced.

The American cases take the same position, and possibly the Maryland courts go even further in declaring that all principles which apply to a bill for specific performance apply with equal force to a bill for perpetual injunction, where that injunction will accomplish all the objects which could be effected by a decree for specific performance. This principle was laid down in *Gurley* v. *Hiteshue* (1847) 5 Gill, 223, involving a bill to restrain the defendant from enforcing a judgment, where the defendant had agreed to receive a conveyance of real property in discharge of the judgment. The doctrine was also applied in *Whalen* v. *Baltimore & O. R. Co.* (1908) 108 Md. 11, 17 L.R.A.(N.S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390, refusing to enjoin a railroad company from breaking its contract to run freight and passenger trains to and from the property of the covenantee after it had, for the public welfare, changed its route, where the burden would be wholly out of proportion to the benefit which would accrue to the covenantee; and also in *Maryland Teleph. & Teleg. Co.* v. *Chas. Simons Sons Co.* (1906) 103 Md. 141, 115 Am. St. Rep. 346, 63 Atl. 314, refusing an injunction to restrain a telephone company from increasing contractual rates and from refusing to continue service at existing rates.

But the other American decisions, like those of England, confine themselves to the principle, as applied in *Sewerage & Water Board* v. *Howard* (1909) 99 C. C. A. 177, 175 Fed. 555, that where the injunction is sought, not against the performance of a specific act in violation of the contract, but against breach of the contract in terms, it is regarded as a bill for specific performance. It was held in that case that the injunction should be denied where the contract is continuing and uncertain as to termination, thus requiring the retention of the bill and the supervision of performance indefinitely.

So, upon the ground that an injunction not against a specific act, but against "violating the contract," is negative specific performance and is governed by the same principles, such an injunction was de-

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nied in *Shubert* v. *Woodward* (1909) 92 C. C. A. 509, 167 Fed. 47, involving a contract between owners of rival theaters, whereby the president of the plaintiff (a corporation) was made manager of defendant's theater for a term of years. The court said that specific performance could not have been decreed because the contract lacked mutuality, and also because to grant such relief would entail years of supervision by the court as to matters requiring the exercise of judgment and special knowledge and experience.

It was held in *Arthur* v. *Oakes* (1894) 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 9 Am. Crim. Rep. 169, distinguishing *Lumley* v. *Wagner* (1852) 1 De G. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652, that equity will not enjoin the employees of a receiver of a railroad from quitting his service, although the effect of such action will be to prevent or hinder the operation of the road. Here the injunction was sought not against a certain affirmative act, but to compel performance of all continuous acts required by the contract of services.

Bour v. *Illinois C. R. Co.* (1912) 176 Ill. App. 185, refused to enjoin a railroad company which had agreed to give complainant the exclusive right of placing advertising in its passenger cars for a certain period, from allowing advertising other than that of the complainant to be placed in the car,—the court apparently being of the opinion that this was but negative specific performance, which could not be affirmatively decreed, and stating that the granting of such an injunction would not benefit the plaintiff if the defendant saw fit to have no advertising whatever placed in its cars, and that "it seems to us illogical and unreasonable to allege the difficulty of assessing damages at law as a reason of resorting to equity, if equity can only give a remedy which furnishes compulsorily no damages or compensation at all, and no enforcement of the broken contract, but only a morally coercive pressure which may lead to juster dealing."

In *Fowler Utilities Co.* v. *Gray* (1907) 168 Ind. 1, 7 L.R.A.(N.S.) 726, 120 Am. St. Rep. 344, 79 N. E. 897, citing *Iron Age Pub. Co.* v. *Western U. Teleg. Co.* (1887) 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449, *supra,* refused on the ground of want of mutuality to enjoin violation of a contract of a heating company, after installing a heating system in the plaintiff's building, to furnish heat at a certain sum per year, where the use of heat from the defendant rested in the plaintiff's discretion.

Peterson v. *McDonald* (1910) 13 Cal. App. 644, 110 Pac. 465, refused a mandatory injunction to compel a landowner to restore the flow of water from his windmill to the plaintiff's premises, and a further injunction against obstructing a plaintiff's use of the water in accordance with a contract by which the defendant agreed to supply the plaintiff from his well at a certain monthly rate. The court

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said that the defendant could not be compelled to maintain the existing windmill and tank, or to restore it if destroyed, and that therefore the relief sought, being in effect a decree for specific performance, could not be granted.

In each of the following cases the Illinois courts said that the injunction sought was negative specific performance, and could be granted only where specific performance would be decreed: *Chicago Municipal Gaslight & Fuel Co.* v. *Lake* (1889) 130 Ill. 42, 22 N. E. 616, refusing to restrain a municipality from interfering with the laying of mains by a gas company, under a grant of right by the municipality, the plaintiff not having shown performance or ability to perform his part of the contract; *Welty* v. *Jacobs* (1898) 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723, refusing an injunction against the proprietor of a theater, to prevent his breach of a contract to furnish the theater, and its equipment, to the manager of a theatrical company for a certain time, and to prevent him from furnishing the theater to a rival company during the period (lack of mutuality); *Cleveland* v. *Martin* (1905) 218 Ill. 73, 3 L.R.A.(N.S.) 629, 75 N. E. 772, refusing the author of a medical text-book an injunction to restrain the publisher from distributing copies alleged to be inferior to those called for by the contract, which required them to be published in first-class form (apparently the principal reason, however, for denying the injunction was the indefinite nature of the contract); *Suburban Constr. Co.* v. *Naugle* (1897) 70 Ill. App. 384, refusing to grant an injunction in favor of a contractor who had contracted to construct a railway, operate it two years, and receive payment in stocks and bonds of the railroad company,—to enjoin the company and other parties to the contract from interfering with the plaintiff's performance, or preventing the issuance of the stock and bonds to the plaintiff; *Streator Teleph. & Teleg. Co.* v. *Interstate Independent Teleph. & Teleg. Co.* (1908) 142 Ill. App. 183, refusing to restrain a telephone company from interfering with a contract by which the plaintiff was alleged to have granted the use of its right of way to the defendant, who, claiming to be a successor in interest of a telephone company, claimed to own the line and to terminate the plaintiff's use thereof; *Minnetonka Oil Co.* v. *Boyd* (1908) 143 Ill. App. 479, refusing to enjoin drilling on oil lands in violation of an oil and gas lease to the plaintiff, the court saying that specific performance could not be decreed for lack of mutuality; *Jackson* v. *Marshall* (1913) 178 Ill. App. 27, refusing to enjoin a corporation from passing resolutions depriving complainant of his office as treasurer, or interfering with him with respect to such office, which he held by virtue of a contract consolidating two constituent companies and naming him as treasurer.

In *Richmond* v. *Dubuque & S. C. R. Co.* (1871) 33 Iowa, 422, the court refused, at the suit of a lessee from a railway company, who

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had agreed to build and operate an elevator for a term of years, to restrain the railroad company from delivering or transferring grain otherwise than through such elevators in violation of a covenant to deliver to the elevator all grain handled by the load. The court without discussion regarded the suit as one for specific performance by injunction, and in denying relief called attention to the want of mutuality, it being impossible to compel performance by the plaintiff, whose contract required it to perform continuous acts demanding skill and experience.

The principle that injunction to restrain breach of contract is negative specific performance, and will not be granted unless specific performance can be decreed, was applied in *Fox* v. *Fitzpatrick* (1907) 190 N. Y. 259, 82 N. E. 1103, refusing an injunction against breach of contract for the purchase of standing timber, the court stating that specific performance could not be decreed, as the remedy at law under the facts was adequate.

St. Regis Paper Co. v. *Santa Clara Lumber Co.* (1900) 55 App. Div. 225, 67 N. Y. Supp. 149, indorsed the rule that where an agreement is such that it is practically impossible for a court of equity to enforce it, and a bill for injunction is in effect a bill for specific performance, equity will not interfere (prayer that the defendant, who agreed to deliver plaintiff a certain amount of pulp wood per year, be enjoined from violating a covenant not to sell or dispose of a certain tract, or the pulp wood thereon, so as to jeopardize or prevent the complete performance of the contract).

On the other hand, *Niagara Falls International Bridge Co.* v. *Great Western R. Co.* (1863) 39 Barb. 212, granted an injunction to a bridge company which had contracted for its use by a railroad company, to restrain the latter from violating provisions in the contract whereby the railroad company agreed to give the directors of the bridge company passes on its trains, and to collect bridge tolls from persons on its trains who were not regular passengers coming or going from or to a minimum distance from the bridge, and to make reasonable regulations to effectuate such purpose. L. A. W.

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[ENGLISH DIVISIONAL COURT.]

THE SALT UNION, LIMITED *v.* BRUNNER, MOND, & COMPANY.

[1906] 2 K. B. 822.
Also Reported in 22 Times L. R. 835, 76 L. J. K. B. N. S. 55, 95 Times L. R. 647.

Mines — Salt mine — Underground brine, rights of adjoining landowners in respect of — Percolating underground water.

The plaintiffs were the owners of a group of rock-salt mines which had for many years been flooded with brine by reason of the fact that the working of the mines had caused the ground above them to subside, with the result that surface water found its way down to the beds of rock salt below, where it became saturated with the salt. These mines had for many years been connected with one another by means of old underground channels and passages, which it was no longer possible to close, and they formed one large reservoir of brine. Into this reservoir there also found its way a certain quantity of other brine which came through fissures in the soil from land outside the plaintiffs' property, but a substantial portion of the brine therein was formed by the dissolution of the plaintiffs' salt rock in the manner above mentioned. The defendants, in the exercise of a license to pump brine granted to them by the previous owner of one of the plaintiffs' mines, pumped large quantities of brine from the said mine and from the reservoir and appropriated it for their own profit:—

Held, that the defendants were not guilty of any actionable wrong in so doing, notwithstanding that they thereby abstracted salt which had formed part of the plaintiffs' rock, and that the continuance of the pumping would cause fresh surface water to dissolve further portions of the plaintiffs' rock into brine, which in its turn would be abstracted by the defendants' pumps.

(August 10, 1906.)

TRIAL before Lord Alverstone, Ch.J., without a jury.

The action was brought for an injunction to restrain the defendants from continuing to pump salt brine from a shaft known as Penny's Lane, near Northwich, in Cheshire; secondly, to recover damages for the abstraction, since 1893, of salt brine, or salt rock, alleged to belong to the plaintiffs; and, thirdly, [823] damages for injuries caused to houses and other property belonging to the plaintiffs by the subsidence of the surface in

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the district to the north of Northwich, due, as the plaintiffs allege, to the pumping of brine by the defendants at the Penny's Lane shaft.

The following statement of facts is taken from the judgment of the Lord Chief Justice:—

Salt mining and brine pumping have gone on in many parts of Cheshire for many generations, probably centuries.[1] The salt rock in the Northwich district consists of two beds; the top bed is found at a distance, varying over the area in question, of from about 47 feet to about 100 feet below Ordnance datum. The upper bed of rock salt is of a thickness of about 80 feet (varying from 70 feet to 90 feet). The base of the top bed is substantially horizontal. Below the top bed is a thickness of 30 feet of marl and marlstone. Below this is the lower bed, which is about the same thickness as the upper; namely, 80 feet. In this district prior to 1835 salt was obtained in two ways, one by sinking a shaft down to the top of the upper bed, and thereby, if the rockhead was found to be wet, pumping up what was called "natural or rockhead brine," or, in other words, water impregnated with dissolved salt rock obtained from the top of the upper bed; and, secondly, by dry mining in the ordinary way; that is, by sinking shafts to the upper or lower bed, as the case may be, and the digging out of mines, in which the salt rock was hewn and sent up in tubs to the surface for subsequent treatment. For the support of the roofs of the mines, in the case of dry mining, pillars of salt from seven to ten yards square were left at a distance of 20 to 25 yards apart. During the latter half of the last century a third method of mining had become common in the district, namely, pumping brine from mines which had become inundated by collapse of the roof and subsidences of the ground, and the access to the unworked salt rock therein of surface water. Immediately to the eastward of the main street in Northwich, known as Witton street, is the shaft belonging to the defendants, known as Penny's Lane. From 1838 [824] onwards, at different dates, owing to the increase of working in the dry mines, and to other causes which need not

[1] See the customary dues from the salt mines of Northwich set out in Domesday Book i 268.—F. P.

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be considered, but which are very important in their results, the roof of some of the dry mines in the district collapsed, some in the upper and some in the lower beds, the mines themselves became flooded, and large areas of water of considerable depth were formed upon the surface due to subsidence. From these areas fresh water found its way down to the upper and lower beds, and became impregnated with salt, and was then pumped up as brine—that is, water saturated with salt—through shafts, either old or new, which were sunk down to the inundated mines.

The mines belonging to the plaintiffs, as to which their claim in this action arises, were nine in number, situated, speaking generally, to the north of the Penny's Lane shaft of the defendants, and were called Marshall's No. 1, Wakefield's (otherwise Worthington's), Barton's, Thompson's, Dunkirk, Marshall's No. 2, Plattshill, Ashton's old mine, and Tomkinson's. It was proved by the plaintiffs, and ultimately admitted by the defendants, that all these nine mines were connected together by underground passages. Some of these passages were originally made for the purpose of ventilation when the mines were worked as dry mines. Salt brine from the mines was pumped by the plaintiffs at Dunkirk shaft, a distance of some 400 yards to the north-east of the Penny's Lane shaft. These nine inundated mines, and the Penny's Lane shaft were known and spoken of in the case as the Dunkirk mines.

By a deed of conveyance dated September 6, 1888, John Thompson, who was at that date the owner of Penny's Lane shaft, conveyed to the defendants Penny's Lane shaft, together with certain land with buildings and workshops thereon, and a small quantity of salt rock lying under certain land adjoining, "Together also with full and free liberty and authority to use the tunnel or driftway and borehole made by the said John Thompson from the said rock-salt mine firstly hereinbefore described," *i. e.*, Penny's Lane, "or any additional tunnels, driftways, or boreholes which may hereafter be constructed by the said company, its successors, or assigns, and which it is hereby authorized and empowered to construct . . . for the purpose of obtaining and [**825**] pumping brine from the flooded mine belonging to the said John Thompson north of the said hereditaments

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hereby assured." The deed also contained a covenant by the defendants that they would "if so required by the said John Thompson, his heirs, or assigns, so long as the same can by any reasonable means be obtained through and by means of the said mine, or the tunnels and shafts thereof, for the time being, supply to the said John Thompson, his heirs, and assigns such quantity of brine not exceeding 15,000,000 gallons in any one year as may be required for the manufacture by the said John Thompson, his heirs, and assigns of white salt on such lands or some of them of him, the said John Thompson." The flooded mine belonging to John Thompson north of the hereditaments in question was that part of Marshall's mine which lay south of a certain stream known as Wade brook, and was Thompson's freehold. This part of Marshall's mine had been worked from the part of Marshall's mine north of Wade brook, so that there was underground connection, through which brine could pass from the mine north of Wade brook to the mine south of Wade brook. The existence of this connection between Marshall's mine north of Wade brook and the mine south of Wade brook was known long before 1888. It had in that year become impossible to prevent brine getting from one part of the mine to the other if pumping took place from any shaft which was connected with the mines so as to withdraw the brine and disturb the equilibrium or balance of brine or water pressure. In fact from the time of their inundation all the nine Dunkirk mines formed an underground reservoir of brine and water which got in from the surface.

On December 3, 1888, the plaintiffs took from the same John Thompson a conveyance of certain mines which lay to the northwest of the land conveyed to the defendants. The actual terms of that deed are not material, but it gave the plaintiff company notice of the conveyance to the defendants of September 6, 1888. On October 3, 1890, the plaintiffs purchased from John Thompson all the minerals in other mines to the northwest of Penny's Lane, and among them the minerals owned by Thompson south of Wade brook, or, in other words, the minerals contained in what was described as Thompson's inundated mine in the deed [826] of September, 1888. This deed recited the grant to the defendants of September 6, 1888, and particularly that part of

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it which gave the defendants full and free liberty to use the bore-hole for the purpose of obtaining and pumping brine from Thompson's flooded mine, and it was expressed to assign to the plaintiffs the full and exclusive benefit of the covenant therein of the defendants to supply brine not exceeding 15,000,000 gallons in a year if required.[1]

The plaintiffs at other dates subsequent to September 6, 1888, —the exact dates are not material,—took conveyances from other persons of the eight other mines in the Dunkirk group already referred to. From the year 1893 onwards the defendants continued to extract from their Penny's Lane shaft brine to an enormous extent; the quantity in the twelve years up till the end of 1905 amounted to upwards of 2,093 million gallons, representing 2,791,000 tons of rock salt. It was admitted by the defendants, by their answers to interrogatories, that no substantial part of the brine pumped by the defendants from the Penny's Lane shaft was produced from the salt rock conveyed by Thompson to the defendants, or in Thompson's inundated mine south of Wade brook. It was, however, contended by them that a very considerable, though unknown, portion of the brine pumped through Penny's Lane shaft came from beds of salt rock which did not belong to the plaintiffs. It was alleged that subsidences occurred at various places in Northwich, and also to the west and north of the Dunkirk area. It was alleged that various other mines to the north and west contributed brine, or allowed access of water which became brine in underground basins, for a very great distance, and that no one could tell where brine pumped up at any shaft was in fact produced. It was urged in addition by the defendants that a considerable portion of the brine which they had pumped at Penny's Lane was rockhead brine formed by [827] the dissolution of salt rock on the top of the upper bed, and possibly to some extent on the top of the lower bed, and not

[1] It was contended by the defendants that the fact of the plaintiffs having taken an express assignment of the benefit of the defendants' covenant estopped them from alleging that the defendants' act in pumping under Thompson's license was wrongful. The Lord Chief Justice, however, was of opinion that as Thompson could not give any rights which he did not possess or any rights over other persons' property, it did not directly affect the question of the defendants' liability.

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mine brine, and that this rockhead brine found its way to the defendants' shaft and to other shafts in the district by means of what were called "brine runs," which were at a considerable depth below the surface, and could only be traced from time to time by the subsidences which they caused. The Lord Chief Justice found as a fact that natural or rockhead brine, as distinguished from mine brine, does travel underground in brine runs for long distances, and might have found its way into the plaintiffs' inundated mines from places outside their property, and that it would consequently be wrong to attribute the whole of the brine pumped at Penny's Lane to salt rock the property of the plaintiffs. On the other hand, he found as a fact that the defendants had by pumping brine abstracted a very large quantity of salt from the beds of rock salt belonging to the plaintiffs, though whether the quantity could ever be estimated was uncertain. And he further found as a fact that if pumping was continued at Penny's Lane the defendants must continue to dissolve more of the plaintiffs' rock, and to abstract the salt therefrom in the brine pumped up from the Penny's Lane shaft.[1]

Balfour Browne, K.C., **Freeman**, K.C., **Bankes**, K.C., **R. V. Bankes**, and **V. Balfour Browne**, for the plaintiffs. The brine which the defendants pumped was, to the extent to which it was formed by the dissolution of the plaintiffs' salt rock, the plaintiff's property, and the defendants were guilty of a trespass in taking it. Any contrivance by which one person takes away the rock salt of another, whether it be by means of a pickaxe or a pump, is equally wrongful. The rule that there is no property in percolating underground water has no application except to water, and brine is a distinct thing from water. In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* [1899] 2 Ch. 217, 68 L. J. Ch. N. S. 457, 63 J. P. 692, 80 L. T. N. S. 815, 15 Times L. R. 374, there was [828] underneath the plaintiff's

[1] As the Lord Chief Justice held, with respect to the plaintiffs' claim for damage caused to their property by subsidence, that, even if the claim were in other respects maintainable, there was not sufficient evidence that that subsidence was caused by the defendants' pumping to justify him in finding for the plaintiffs on that head, that part of the case has been omitted from the report.

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land a stratum of quicksand known as "running silt," which stratum extended under the defendants' land adjoining. The defendants, in excavating their own land, withdrew the running silt from under the plaintiff's land and thereby caused it to subside. Lindley, M.R., and Rigby, L.J., held that the rule of *Popplewell* v. *Hodkinson* (1869) L. R. 4 Exch. 248, 38 L. J. Exch. N. S. 126, 20 L. T. N. S. 578, 17 Week. Rep. 806, that a landowner has no common-law right to the support of subterranean water, did not apply to silt, and that the defendants, in removing the support of the silt, had committed an actionable nuisance. So, too, in *Trinidad Asphalt Co.* v. *Ambard* [1899] A. C. 594, 68 L. J. P. C. N. S. 114, 48 Week. Rep. 116, 81 L. T. N. S. 132, where the defendants, by removing the lateral support of their land, caused the pitch which formed the main ingredient of the plaintiffs' land to melt and ooze forth into their own land, and thereupon appropriated it to their own use, it was held that damages were recoverable both for injury caused by subsidence of the plaintiffs' surface and for loss of the pitch. Then if silt and pitch, although fluid, are not governed by the rule as to water, neither is brine. No distinction can be drawn for this purpose between the case of a mineral which is rendered fluid by reason of its being held in suspension in water, as in the case of the silt, and one in which it is rendered fluid by reason of its being held in solution, as in the present case. In neither case is the fluid product water. Copper is sometimes pumped up from a mine in solution, and then precipitated by iron, and so won by the mine owners; but a neighboring landowner could not justify draining the copper solution away and appropriating it to his own use.

[They also referred to *Grand Junction Canal Co.* v. *Shugar* (1871) L. R. 6 Ch. 483, 24 L. T. N. S. 402, 19 Week. Rep. 569, and *Fletcher* v. *Birkenhead Corporation* [1906] 1 K. B. 605, 75 L. J. K. B. N. S. 183, 70 J. P. 170, 94 L. T. N. S. 18, 22 Times L. R. 206, 4 L. G. R. 483.]

Sir R. B. Finlay, K.C., **Upjohn,** K.C., **A. J. Walter,** and **Rowlatt,** for the defendants. No action lies against the defendants for abstracting salt in the way in which it was done. The case of *Wilson* v. *Waddell* (1876) 2 App. Cas. 95, 35 L. T. N.

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S. 639, 14 Mor. Min. Rep. 25, is an authority for the proposition that where mineral workings have caused a subsidence of the surface and a consequent flow of rainfall into an adjacent lower coal field, the injuries, being entirely from gravitation and [829] percolation, are not a valid ground for any claim of damages. And in that case Lord Blackburn cited with approval a passage from the judgment of Lord Cairns in *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, at p. 338, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235, where he said: "The owners or occupiers of the close . . . might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if in what I may term the natural user of that land there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not complain that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." Therefore, in the present case, as the brine found its way by gravitation into the defendants' property as the result of the plaintiffs or their predecessors in title having worked their mines in the ordinary way, the defendants could not complain of their being invaded by that brine. The plaintiffs were not bound to keep up a barrier to prevent the invasion. That being so, the defendants were entitled to protect their property and get rid of the brine by pumping it out; and if they were entitled to pump it out for purposes of protection, they were equally entitled to pump it out for purposes of profit, for the motive with which a man does an otherwise lawful act is perfectly immaterial. *Bradford Corporation* v. *Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 190, 60 J. P. 3. Though the plaintiffs were not bound to erect a barrier for the benefit of the defendants, if they wanted to keep the brine for themselves they were bound to erect a barrier for their own protection. The onus of erecting the barrier lies on the party complaining

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of the brine's escape; and that it was practically impossible here to erect such a barrier does not affect the rights of the parties. The rule laid down in *Acton* v. *Blundell* (1843) 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168, and *Chasemore* v. *Richards* (1859) 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, as to the right of a landowner to appropriate percolating underground [830] water applies equally to brine. The distinction between water and brine is one of degree only, not of kind; for all water contains a certain proportion of salt. The difference, however, between water and running silt such as that in *Jordeson's Case* [1899] 2 Ch. 217, 68 L. J. Ch. N. S. 457, 63 J. P. 692, 80 L. T. N. S. 815, 15 Times L. R. 374, is one of kind. In that case the silt was nothing more than wet sand, the evidence being that the proportion of sand preponderated greatly over that of the water. Moreover, Vaughan Williams, L.J., dissented from the judgments of the other members of the court. The plaintiffs, therefore, cannot complain of the loss of the brine.

[They also referred to *Cabot* v. *Kingman* (1896) 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344, and *Ballard* v. *Tomlinson* (1885) 29 Ch. D. 115, 54 L. J. Ch. N. S. 454, 52 L. T. N. S. 942, 33 Week. Rep. 533, 49 J. P. 692.]

Balfour Browne, K.C., in reply.

Cur. adv. vult.

Lord Alverstone, Ch. J., after stating the facts as above set out, proceeded: Upon the stated facts found by me the difficult question of law arises, Are the plaintiffs entitled to recover in respect of their claims, and are they entitled to restrain the defendants from continuing to pump brine at Penny's Lane? The defendants have by their pumping raised a very large quantity of brine formed by the dissolution of rock salt belonging to the plaintiffs. At the same time I also find that the brine so pumped by the defendants has been more or less mixed with brine derived from other sources; that is, from the dissolution of rock which does not belong to the plaintiffs. Under those circumstances, have the defendants committed an actionable

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wrong? This seems to me a question of the greatest difficulty, and my mind has fluctuated very much, not only during the arguments, but during the consideration of the case. It is not, I believe, covered by authority, and it is extremely difficult to see within which class of case it falls.

For the sake of clearness I will endeavor to summarize certain points or arguments which bear upon the question whether there are any previous decisions which govern the case. The defendants relied largely upon the cases relating to underground water, [831] such as *Chasemore* v. *Richards* (1859) 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685. I doubt very much whether they afford conclusive arguments in all cases of brine pumping. Suppose, for instance, A's land remaining in its natural condition and containing beds of rock salt, B, the owner of an adjoining piece of land, on sinking a well, found that he could pump brine which beyond question came from the dissolution of the salt rock of his neighbor A, and not from any salt rock on B's own land, or which he had a right to get, and that B continued his pumping, not for water, but to obtain the salt rock of his neighbor. I am not at present prepared to say that no action would lie by A against B on the ground solely of the principle as to underground water laid down in *Chasemore* v. *Richards, supra,* and similar cases. The plaintiffs, adopting this contention, suggested that the case fell within a ruling of the majority of the court in *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* [1899] 2 Ch. 217, 68 L. J. Ch. N. S. 457, 63 J. P. 692, 80 L. T. N. S. 815, 15 Times L. R. 374, and particularly the judgment of Lord Lindley, as Master of the Rolls, quoting with approval the opinion of the supreme court of Massachusetts in the case of *Cabot* v. *Kingman* (1896) 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344. The plaintiffs also relied upon the case of *Trinidad Asphalt Co.* v. *Ambard* [1899] A. C. 594, 68 L. J. P. C. N. S. 114, 48 Week. Rep. 116, 81 L. T. N. S. 132. In my opinion, however, rightly understood, the principle of those cases is not one on which the plaintiffs can successfully rely in this action; they were cases of the withdrawal of support to which the person complaining was entitled, and, except in so far as the action is based on the

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claim for damages for subsidence, are clearly distinguishable from the case now before me. Nor does the case of *Grand Junction Canal Co.* v. *Shugar* (1871) L. R. 6 Ch. 483, 24 L. T. N. S. 402, 19 Week. Rep. 569, carry the plaintiffs any further, because here the real complaint is not of the drawing off of any fresh water to which the plaintiffs claim a right, but the removal of their salt rock or the abstraction of the brine which has been produced from their beds of rock salt. I think this case can only be rightly decided by bearing in mind the true state of the facts, and endeavoring to ascertain what are the rights of the parties having regard to those facts. Long prior to 1888, when the defendants and plaintiffs acquired their mines respectively, the [832] actual condition of things had been wholly changed. The combined result of underground mining, pumping for natural brine, and the connecting together of underground and different mines, followed by the subsequent inundations, had created a wholly artificial state of things. A shaft lawfully put down through any man's freehold might reach some underground channel, or cavity, from which he would pump brine, the real source of which no one could accurately predict, although it might be possible after the event, by tracing subsequent subsidences, to form a judgment as to the area from which the salt rock had been dissolved. It seems to me that to such an abnormal and, from one point of view, artificial condition of matters, looking, moreover, to the fact that the water which had dissolved the salt might come from long distances, far away from any particular pumping shaft, and might be in many cases underground or even surface water in which no property existed in anyone, it is not possible to apply to such a case the ordinary principles of law relating to underground property. That they cannot be applied in the matter of subsidences has been recognized by the legislature, and led to the brine pumping (compensation for subsidence) act 1891; but I think that when a man puts down a shaft and pumps in his own land (both of which acts are prima facie lawful), the act does not of necessity become unlawful simply because it turns out that the brine thereby obtained may be the result of dissolution of rock in another man's property. It must depend upon the particular circumstances of the case. I

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state this view with very great diffidence, but it is the best that I am able to form after very careful and anxious consideration. So far as one may argue from analogy, pumping of brine under such circumstances appears to me to have more in common with the cases of underground water than the cases of support upon which the plaintiffs rely, but I have already indicated that, in my opinion, the cases as to underground water are not conclusive, assuming matters to remain in their natural condition. The cases of *Acton* v. *Blundell* (1843) 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168, and *Smith* v. *Kenrick* (1849) 7 C. B. 515, 18 L. J. C. P. N. S. 172, 13 Jur. 362, 6 Mor. Min. Rep. 142, are illustrations of the principle which is to be found in many other decisions, that the exercise of a lawful right of mining does not become unlawful [**833**] because it may injure adjoining proprietors. See also *Wilson* v. *Waddell* (1876) 2 App. Cas. 95, 35 L. T. N. S. 639, 14 Mor. Min. Rep. 25; and the case of *Bradford Corporation* v. *Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 190, 60 J. P. 3, shows that if the use of the property is lawful the motive is immaterial. *Popplewell* v. *Hodkinson* (1869) L. R. 4 Exch. 248, 38 L. J. Exch. N. S. 126, 20 L. T. N. S. 578, 17 Week. Rep. 806, and *Fletcher* v. *Birkenhead Corporation* [1906] 1 K. B. 605, 75 L. J. K. B. N. S. 183, 70 J. P. 170, 94 L. T. N. S. 18, 22 Times L. R. 206, 4 L. G. R. 483, are cases dealing with the rights of support only. I would, however, call attention to the fact that in the case of *Birmingham Corporation* v. *Allen* (1877) 6 Ch. D. 284, 46 L. J. Ch. N. S. 673, 37 L. T. N. S. 207, 25 Week. Rep. 810, 14 Mor. Min. Rep. 14, both Sir George Jessel, as Master of the Rolls, and the Court of Appeal recognized that the rights of adjoining proprietors may be very different where the natural state of things has been interfered with from those in which the land remained in its natural condition.

To summarize my view as applicable to the special facts of this case, I find as a fact that for many years prior to 1888 the nine mines forming the Dunkirk group were connected together underground by channels and means of communication which no human agency or operations could close; that through these

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channels brine, formed in the salt rock partly in one mine and partly in another, would collect and would mix with brine reaching the same open spaces from districts outside, possibly north, south, east, and west; that in September, 1888, Thompson granted to the defendants a right to put a shaft down and a borehole to communicate with his inundated mine south of Wade brook. Pumping under that license would inevitably lead to the drawing of brine from one or more of the nine Dunkirk mines and the wider area, and the consequent dissolution of further rock salt over the same district by the access of fresh water from the surface. At a later date the plaintiffs acquired a similar right from Thompson, and in addition property in the salt rock still existing in Thompson's mine south of and in other beds north of Wade brook, with the certainty that whenever they pumped, their pumping would also draw brine formed by the dissolution of rock partly in their own, partly in the property of others. Under these circumstances I am unable to come to the conclusion that the defendants have committed any actionable wrong in respect of which the plaintiffs [**834**] are entitled either to an injunction or to damages. The action will therefore be dismissed, with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Busk, Mellor, & Norris, for J. H. Cooke, Winsford.*

Solicitors for defendants: *W. W. Wynne & Sons, for Forshaw & Hawkins, Liverpool.*

Note.—Right to pump up water where the result is to carry away another's mineral in solution.

A search has failed to disclose the existence of any other decision dealing with the correlative rights of owners of saline deposits. The most nearly analogous case is perhaps that of *Hathorn* v. *Natural Carbonic Gas Co.* (1909) 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 Ann. Cas. 989, where it was held that a landowner who has tapped, by wells located on his land, a reservoir of mineral water extending under a large area, will be enjoined from drawing it by means of pumps or other apparatus for the purpose of securing for the market a supply of gas arising from the

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water, thereby wasting great quantities of the water and destroying or impairing its flow from springs located on the lands of others, and destroying or impairing the valuable character of the water for purposes for which it had habitually been used. And in explaining the foregoing decision the court in *People* v. *New York Carbonic Acid Gas Co.* (1909) 196 N. Y. 421, 90 N. E. 441, said it had there held that "while a landowner was entitled to make every use of the waters flowing under the surface of his land, which might be for the legitimate improvement or enjoyment of his lands, however it interfered with others as a natural consequence, if his use was unreasonable in the sense that he was attempting to increase the flow of the waters upon his lands, for a purpose not connected with such improvement or enjoyment, and to the destruction or diminution of the flow under the adjacent lands of others, he was committing an unlawful act."

As to the right to pump up percolating water where in consequence of its carrying silt or quicksand with it the result is to disturb the subjacent support of adjoining land, see *Jordeson* v. *Sutton, S. & D. Gas Co.* [1899] 2 Ch. 217, 68 L. J. Ch. N. S. 457, 63 J. P. 692, 80 L. T. N. S. 815, 15 Times L. R. 374 and *Cabot* v. *Kingman* (1896) 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344.

As to correlative rights in percolating waters, see notes in 64 L.R.A. 236, 17 L.R.A.(N.S.) 650; 23 L.R.A.(N.S.) 331; 25 L.R.A. (N.S.) 465, and 37 L.R.A.(N.S.) 193. As to the character of water flowing underground in a defined but unknown channel, see *Bradford Corp.* v. *Ferrand,* 2 B. R. C. 980 and note thereto appended, in which a number of the decisions which recognize the existence of correlative rights in percolating waters are enumerated.

In reading THE SALT UNION v. BRUNNER, M. & Co. it should be noted that Lord Alverstone was careful to confine the scope of his decision to the special facts of the case, holding, in effect, that as between parties who acquired their respective rights under the same original owner, at a time when the artificial situation existed which permitted the brine to be drawn off in the manner complained of, the one who had subsequently acquired his property could not obtain damages or an injunction as against the other, who had previously acquired the right to pump brine from a connected mine; and that he expressly left open the question whether, under a claim of right to percolating waters, the owner of one tract may pump brine which unquestionably comes from the dissolution of salt rock on his neighbor's land.

The American lawyer, confronted by the necessity of ascertaining the respective rights of adjoining landowners in such a situation, will find the most nearly analogous body of law to be that developed by decisions relating to oil and natural gas. These minerals, to

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employ the celebrated metaphor of the Pennsylvania supreme court in *Westmoreland & C. Natural Gas Co.* v. *De Witt* (1889) 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724, are *feræ naturæ,* in the sense that they become the property of the landowner who first reduces them to possession. "In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' . . . They belong to the owner of the land and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land and taps your gas so that it comes into his well and under his control, it is no longer yours, but his." *Ibid.*

And the United States Supreme Court in *Brown* v. *Spilman* (1895) 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245, said: "If an adjoining owner drills his own land and taps a deposit of oil or gas extending to his neighbor's well, so that it comes into his well, it becomes his property."

See also to the same effect, *Poe* v. *Ulrey* (1908) 233 Ill. 56, 84 N. E. 46; *Fairbanks* v. *Warrum* (1914) — Ind. App. —, 104 N. E. 983; *Louisville Gas Co.* v. *Kentucky Heating Co.* (1908) 132 Ky. 435, 111 S. W. 374; *People's Gas Co.* v. *Tyner* (1892) 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481; *Townsend* v. *State* (1907) 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; and see generally, as to property in mineral oil or gas, note to *Williamson* v. *Jones,* 25 L.R.A. 222.

Accordingly, an owner of land may pump, use, and sell oil, though his wells are so located as to lessen the flow of his neighbor's wells dug prior to his. *Rumsey* v. *Sullivan* (1914) 166 App. Div. 246, 150 N. Y. Supp. 287.

And in *Barnard* v. *Monongahela Natural Gas Co.* (1907) 216 Pa. 362, 65 Atl. 801, it is said: "'The right of every landowner to drill a well on his own land at whatever spot he may see fit' certainly must be conceded. If, then, the landowner drills on his own land at such a spot as best subserves his purposes, what is the standing of the adjoining landowner whose oil or gas may be drained by this well? He certainly ought not to be allowed to stop his neighbor from developing his own farm. There is no certain way of ascertaining how much of the oil and gas that comes out of the well as when *in situ* under this farm and how much under that. What, then, has been held to be the law?—it is this, as we understand it, every landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others. He may distribute them

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over the whole farm, or locate them only on one part of it. He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What, then, can the neighbor do? Nothing, only go and do likewise."

In *Kelley* v. *Ohio Oil Co.* (1897) 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399, it was held that a petition for an injunction to restrain the drilling or operation of oil wells on adjoining land near the division line failed to state a cause of action, although it alleged that oil within a radius of from 200 to 250 feet to a well would be drawn thereto, and that the defendants, with a design to extract the oil from under plaintiff's land, had located and were about to drill a line of oil wells 25 feet from the division line. The court evidently regarded the drilling of similar wells on plaintiff's land near the boundary as his only remedy, saying that "the protection of lines of adjoining lands by the drilling of wells on both sides of such lines affords an ample and sufficient remedy for the supposed grievances complained of."

Although the owner of a natural-gas well may explode nitroglycerin therein for the purpose of enlarging the well, notwithstanding the effect is to diminish the supply of gas to the wells of adjoining owners (see *People's Gas Co.* v. *Tyner* (1892) 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481; *Greenfield Gas Co.* v. *People's Gas Co.* (1892) 131 Ind. 599, 31 N. E. 61), it has been held that pumps or other artificial devices to increase the flow of gas from a continuous and limited common reservoir, to the damage of owners of other wells supplied from such reservoir, may be enjoined (*Manufacturers' Gas & Oil Co.* v. *Indiana Natural Gas & Oil Co.* (1900) 155 Ind. 461, 50 L.R.A. 768, 57 N. E. 912, 20 Mor. Min. Rep. 672; *Manufacturers' Gas & Oil Co.* v. *Indiana Natural Gas & Oil Co.* (1901) 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080, 21 Mor. Min. Rep. 194).

On the other hand, it has been held that a pump may lawfully be used by the lessee of oil and gas lands for the purpose of increasing a well's production of oil by suction, although the production of oil and gas in wells on adjoining lands is thereby diminished. *Jones* v. *Forest Oil Co.* (1900) 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350.

A basis for reconciling these decisions may perhaps be found in the fact that while a gas well which has to be pumped in order to obtain gas is of no value whatever as a gas well, such is not the case in regard to oil wells, which ordinarily require to be pumped in order to get the oil which is contained in the immediately underlying strata. If the effect is to drain away oil under adjoining lands, the case is one in which the *damnum*, being the result of the exercise of a lawful right, is *absque injuria*. E. S. O.

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[ENGLISH COURT OF APPEAL.]

BAILEY v. THURSTON & COMPANY, LIMITED.

[1903] 1 K. B. 137.
Also Reported in 72 L. J. K. B. N. S. 36, 51 Week. Rep. 162, 88 L. T. N. S. 75, 10 Manson, 1.

Bankruptcy — After-acquired property — Contract of employment made before bankruptcy — Breach of contract after bankruptcy — Right of bankrupt to sue — Intervention of trustee — Bankruptcy act 1883 (46 & 47 Vict. c. 52), § 44.

An undischarged bankrupt, employed as traveler for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in bankruptcy not having intervened in the action.

Judgment of Phillimore, J., [1902] 2 K. B. 397, 71 L. J. K. B. N. S. 800, 87 L. T. N. S. 364, affirmed.

(November 24, 1902.)

APPLICATION for a new trial or that judgment should be entered for the defendants in an action tried by Phillimore, J., with a jury, reported on further consideration, [1902] 2 K. B. 397.

The action was brought to recover damages for the wrongful dismissal of the plaintiff from his employment by the defendants.

One of the defenses pleaded was that the plaintiff was adjudicated a bankrupt before the action was brought, and remained an undischarged bankrupt when it was brought, and that the trustee was not a party to the action, which therefore could not be maintained.

The facts proved or admitted at the trial were, so far as is material for this report, as follows: By an agreement in writing, dated April 24, 1899, the defendants, who carried on the business of manufacturers of billiard tables, agreed to employ the plaintiff, and he agreed to serve them, as their traveler for a period of five years from April 17, 1899, at a salary, to be paid weekly, and commission, to be paid monthly, on all orders procured by him for them. Early in the month of June, 1901,

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the plaintiff was adjudicated a bankrupt. Subsequently, on June 29, 1901, the defendants dismissed him from their employment, and he thereupon brought his action for wrongful dismissal, being then an undischarged bankrupt. The jury gave a verdict for the plaintiff, damages 100*l.*; and [**138**] on an application for judgment the learned judge adjourned the case for further consideration, and, after argument, directed that judgment should be entered for the plaintiff. [1902] 2 K. B. 397.

The trustee in the bankruptcy of the plaintiff did not intervene at any stage of the proceedings.

The defendants appealed.

Kemp, K.C., and **E. W. Hansell**, for the defendants. With certain statutory exceptions all the property of a bankrupt vests in his trustee, including contracts, and the right to bring actions for breach of those contracts. It is immaterial whether the breach arises before or after the bankruptcy. In *Wadling* v. *Oliphant* (1875) 1 Q. B. D. 145, 45 L. J. Q. B. N. S. 173, 33 L. T. N. S. 837, 24 Week. Rep. 246, an undischarged bankrupt obtained by order of a court a sum of money in lieu of proper notice of dismissal, and it was held that the sum was not personal earnings, but compensation, and that the trustee was entitled to claim it. *Emden* v. *Carte* (1881) 17 Ch. D. 169, 768, 51 L. J. Ch. N. S. 41, 44 L. T. N. S. 636, in which the order of events was the same as that in this case, was also a case of wrongful dismissal in which the bankrupt sued, and Kay, J., added the trustee, and gave him the conduct of the case. An appeal was dismissed, and the judgments in the Court of Appeal show that the right of action had passed to the trustee. The wrong plaintiff had sued in that case, but there was no right to substitute another plaintiff in the action, and the court did the next best thing by adding the trustee as plaintiff. Without that addition there would have been a good defense to the action. In respect of personal earnings after the bankruptcy, the bankrupt may sue subject to the right of the trustee to intervene; but cases as to the right of the trustee to intervene do not apply to such a case as the present, where there was a contract before the bankruptcy and a breach after it.

[They referred to *Stanton* v. *Collier* (1854) 3 El. & Bl. 274;

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In re Byrne, Ex parte Henry (1892) 9 Morrell, 213, 67 L. T. N. S. 230; *Osman* v. *Raphael* (1896) 12 Times L. R. 376.]

[139] **Lord Coleridge**, K.C., and **Macoun** (with them **Bovill W. Smith**), for the plaintiff. Damages recovered for a breach, after the bankruptcy, of a contract of employment made before it are after-acquired property, in respect of which the trustee may intervene; but for such a breach the bankrupt may sue, unless and until intervention takes place. *Herbert* v. *Sayer* (1844) 5 Q. B. 965, 2 Dowl. & L. 49, 13 L. J. Q. B. N. S. 209, 8 Jur. 812; *Jameson* v. *Brick and Stone Co.* (1878) 4 Q. B. D. 208, 39 L. T. N. S. 594, 48 L. J. Q. B. N. S. 249, 27 Week. Rep. 221. The right of the trustee to intervene, whether during the action or after verdict, does not affect the right of the bankrupt to sue. If a breach of contract takes place before the bankruptcy, the right of action passes to the trustee; but in this case the plaintiff after the bankruptcy was bound to go on serving the defendants, and the breach of contract on their part arose after the bankruptcy. If the trustee were to sue for the wrongful dismissal of the bankrupt, he would have to aver willingness and readiness on the part of the latter to go on serving,—a matter over which the trustee could have no control. Further, this contract for personal service was not one that would pass to the trustee, because he could not undertake the obligations raised by it. If the contract did not vest in the trustee, he could not sue for the breach of it; and therefore the plaintiff was the proper person to bring the action. The case might have been different if the claim had included property other than personal earnings, as in the case of an architect (*Emden* v. *Carte* (1881) 17 Ch. D. 169, 768, 51 L. J. Ch. N. S. 41, 44 L. T. N. S. 636); or of a doctor who supplied medicines (*Elliott* v. *Clayton* (1851) 16 Q. B. 581, 20 L. J. Q. B. N. S. 217, 15 Jur. 293); but this claim arises only out of a contract for personal service. The opinions of the judges given in the House of Lords in *Beckham* v. *Drake* (1849) 2 H. L. Cas. 579, 13 Jur. 921, show that in such a case as this the bankrupt may sue. *Wadling* v. *Oliphant* (1875) 1 Q. B. D. 145, 45 L. J. Q. B. N. S. 173, 33 L. T. N. S. 837, 24 Week. Rep. 246, which is relied on to show that the plaintiff could not sue,

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relates to the title of the trustee to money actually recovered by the bankrupt. The plea, therefore, which does not aver that the trustee has intervened, is no answer to the action.

[They cited also *Williams* v. *Chambers* (1847) 10 Q. B. 337; *Ex parte* [140] *Dewhurst* (1871) L. R. 7 Ch. 185, 41 L. J. Bankr. N. S. 18, 25 L. T. N. S. 731, 20 Week. Rep. 172; *Ex parte Carter* (1876) 2 Ch. D. 806, 45 L. J. Bankr. N. S. 145, 35 L. T. N. S. 388; *Cook* v. *Whellock* (1890) 24 Q. B. D. 658, 59 L. J. Q. B. N. S. 329, 62 L. T. N. S. 675, 38 Week. Rep. 534; *Cohen* v. *Mitchell* (1890) 25 Q. B. D. 262, 59 L. J. Q. B. N. S. 409, 63 L. T. N. S. 206, 38 Week. Rep. 551, 7 Morrell, 207; *In re Roberts* [1900] 1 Q. B. 122, 69 L. J. Q. B. N. S. 19, 48 Week. Rep. 132, 81 L. T. N. S. 467, 16 Times L. R. 29, 7 Manson, 5.]

E. W. Hansell, in reply.

Cur. adv. vult.

Collins, M.R.: This is an appeal from a decision of Phillimore, J., on further consideration after the trial of the action with a jury.

The facts upon which the question before us arises are shortly that the defendants agreed to employ the plaintiff, and he agreed to serve them, as their traveler for a period of five years from April 17, 1899, at a salary, to be paid weekly, and commission, to be paid monthly, on all orders procured by him. Early in June, 1901, the plaintiff was adjudicated bankrupt, and on the 29th of the same month the defendants dismissed him from their employment, and he thereupon brought an action for wrongful dismissal, being then an undischarged bankrupt, and recovered 100*l.*

In that action the defendants pleaded that the plaintiff was adjudicated a bankrupt before the action was brought, and was an undischarged bankrupt when it was brought; and that the trustee was not a party to the action, and that, in consequence, the action was not maintainable.

The question is whether that is a good defense, or, in other words, whether the action can be maintained by the plaintiff in his own name. The learned judge held on further considera-

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tion that the plea failed, and I have come to the conclusion that his judgment was right.

The principle applicable to this case is, in my opinion, clearly decided by *Beckham* v. *Drake* (1849) 2 H. L. Cas. 579, 13 Jur. 921. This is one of the class of cases in which the bankrupt's own labor is the only consideration on his part for the contract by his employers to employ him and pay him a salary, and does not come within the class of cases in which some other consideration is given by the bankrupt for his employer's contract.

[141] In case of the breach of such a contract as existed in the present case, complete at the date of the bankruptcy, and sounding in a money claim, there is no doubt that the right of action would pass to the trustee, and that he would be the proper person to sue. But so far as the contract for personal service was *in fieri* and still unperformed, it seems to me to be clear upon consideration of *Beckham* v. *Drake, supra,* that an action for breach of contract would not belong to the class of actions which the trustee could claim the right to bring as assignee of the property of the bankrupt. Whatever claim he might have to the proceeds of such an action, he could not put in suit in his own right a contract which was still *in fieri,* and in respect of which it would be necessary to allege that the bankrupt was always ready and willing to perform his part. This view is very clearly stated in the opinions of the learned judges given at the hearing of *Beckham* v. *Drake, supra,* in the House of Lords. I take, for example, a passage from the opinion of Cresswell, J., at p. 615 of the report, which seems to me to put in a concrete form that which was said by several of the judges. The passage is this: "I agree that a contract for the future work and labor of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labor of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established

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that rights of action in general are vested in the assignees." There is also a passage from the opinion of Parke, B., at p. 625 of the report to the same effect: "The contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed." It may be observed that the contract under consideration in that case was very similar to that in the present case, for there was an agreement to employ the [142] appellant for a term of years at a salary; and the action was for breach of that contract by dismissing the appellant before the expiration of the term. That breach, however, occurred before the bankruptcy, and the House of Lords held that the right of action for that breach passed to the assignee. The conclusion from the passages that I have cited is that there is no justification for the contention that this contract, with all its incidents, passed to the trustee. The cause of action for the wrongful dismissal of the plaintiff arose after his bankruptcy, and that, in the opinion of the learned judges, was a cause of action in respect of which the plaintiff could sue. There is a well-known principle in regard to rights accruing to the bankrupt after the bankruptcy and in respect of his personal services, that, though the bankrupt is the proper person to sue in such a case, the trustee may intervene and take the proceeds of the action except in so far as they are necessary for the bankrupt's maintenance. The questions whether the trustee can intervene in the action, and whether the bankrupt can maintain the action, are distinct, and the latter is the only one for our decision here, and, on the authorities that I have cited, the decision of the learned judge must be supported.

It has been argued for the defendants that the point has been decided in two cases in favor of the view that the trustee is the proper person to sue. The first of them is *Emden* v. *Carte* (1881) 17 Ch. D. 169, 768, a case decided by Fry, J. The headnote of that case as reported on appeal is as follows: "The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878,

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and had never obtained his discharge: *Held,* that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as coplaintiff in the action, and give him the conduct of the action." The order of events was that the contract came first, then the bankruptcy, and then the dismissal. Fry, J., held that he could not substitute the trustee, but could make him a party to the action. The appeal [143] from his decision was dismissed by the Court of Appeal. Phillimore, J., has dealt with that case in his judgment ([1902] 2 K. B. 397, at p. 401, 71 L. J. K. B. N. S. 800, 87 L. T. N. S. 364), and I agree with the learned judge that the decision does not involve the proposition that the action was one that could not be maintained by the bankrupt, without the trustee being made a plaintiff, but that it decided that the trustee could intervene. It was pointed out by Fry, J., and in the Court of Appeal that the contract was not one of the narrow class arising only on the personal service of the bankrupt. The decision is not in point on the question before us, because it does not involve the proposition that the bankrupt could not maintain the action. The trustee would have the right to the proceeds of the action, and the court gave him the opportunity of obtaining this by making him a party to the action.

The other case relied on is more easily distinguishable. In *Wadling* v. *Oliphant* (1875) 1 Q. B. D. 145, the headnote is as follows: "A bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent court 104*l.* as six months' salary in lieu of proper notice of dismissal: *Held,* that the bankrupt's trustee could claim the money before it was paid to him, as against any creditors, subsequent to and without notice of the bankruptcy; for that, first, the trustee had been guilty of no breach of duty towards such creditors, so as to estop him from setting up his claim; and, secondly, that the money was not the proceeds of the bankrupt's personal labor subsequent to his bankruptcy, but a compensation for the breach of a contract, which became part of his estate in bankruptcy." In

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that case there was an ascertained sum accruing to the bankrupt after the bankruptcy under the award of a court, and in respect of that sum it was held that the trustee could intervene. This decision does not affirm that the bankrupt had no right of action, but upholds the right of the trustee to intervene. Neither of these cases, therefore, decides the point which is raised in the present case on behalf of the defendants.

[144] I am of opinion, therefore, that the principle to which I have referred as laid down in *Beckham* v. *Drake* (1849) 2 H. L. Cas. 579, 13 Jur. 921, governs the present case, and that unless and until the trustee intervenes the plaintiff has a right to bring this action.

The defense raised by the defendants therefore fails, and the appeal must be dismissed.

Stirling, L.J.: I am of the same opinion. It is important to observe the sequence of events in this case. First, there is a contract to employ the plaintiff for a term of years. The next event is the bankruptcy of the plaintiff and the appointment of a trustee in the bankruptcy; and after that there is the breach of contract in respect of which this action is brought to recover damages, the result of that action being that 100*l.* has been recovered.

The question raised is whether the bankruptcy of the plaintiff is an answer to his claim in the action, it not being proved or alleged that the trustee has intervened. It has been contended that on the bankruptcy of the plaintiff the contract vested in the trustee. The question as to what contracts vest on bankruptcy in assignees was considered by the Court of Exchequer in *Gibson* v. *Carruthers* (1841) 8 Mees. & W. 321, 58 Revised Rep. 713, and Parke, B., in his judgment said: "There can be no doubt that the effect of the assignment under 6 Geo. IV. c. 16, §§ 12 and 63, is to vest in the assignees, to use the language of Lord Tenterden in *Wright* v. *Fairfield* (1831) 2 Barn. & Ad. 727, at p. 732, every beneficial matter belonging to the bankrupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts, by which benefit may accrue to that estate, and such as may be performed on the part of the

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bankrupt by the assignees; such, in short, as would pass as part of his personal estate to his executors if he had died, which would not include that description of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration." It was, therefore, laid down that contracts in which personal skill was a material part of the consideration were excepted from the operation of the bankruptcy statute then in force. If that [**145**] exception was in accordance with law, there is nothing in any subsequent bankruptcy act to alter it, and the question before us really is whether the law was correctly laid down in the passage that I have quoted. Not very long after that decision there occurred the case of *Beckham* v. *Drake* (1849) 2 H. L. Cas. 579, 13 Jur. 921, which was carried to the House of Lords. In that case the sequence of events was different from that which occurred in the present case. There was first in order the contract, next the breach, and afterwards the bankruptcy; and it was held that the right of action in respect of the breach vested in the assignee in bankruptcy. The House was advised by a large number of judges, many of whom expressed a clear opinion to the same effect as the judgment of Parke, B., in *Gibson* v. *Carruthers, supra.* In addition to the opinions that have been referred to by the Master of the Rolls, I desire to call attention to those of Williams, J., at p. 598 of the report, of Earle, J., at p. 604, and of Wilde, Ch.J., at p. 633. None of the learned judges expressed any opinion to the contrary effect, and in my judgment the view of Parke, B., is supported by authority and is correct in principle. In the case of a contract *in fieri* and unexecuted, which cannot be completed without the assistance of the bankrupt, the trustee would be unable to complete it without the co-operation of the bankrupt, nor could the trustee compel such co-operation. Such a contract is incapable of assignment, and in my opinion it is impossible to hold that it would vest in the trustee on the bankruptcy occurring. Two cases—*Emden* v. *Carte* (1881) 17 Ch. D. 169, 768, 51 L. J. Ch. N. S. 41, 44 L. T. N. S. 636, and *Wadling* v. *Oliphant* (1875) 1 Q. B. D. 145, 45 L. J. Q. B. N. S. 173, 33 L. T. N. S. 837, 24 Week. Rep. 246—were relied on to support the view that the plaintiff could not recover

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in this action; but they seem to me to decide no more than that the trustee may intervene and claim the damages which the plaintiff has recovered. Down to the present moment the trustee has not intervened, and the plaintiff is entitled to retain his judgment.

Cozens-Hardy, L.J.: It has been established for many years that, notwithstanding the generality of the language used in [146] the bankruptcy acts, there are some contracts and some rights that do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee, and not the bankrupt, will take the money. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation. It is clear that the plaintiff's contract of service did not pass to the trustee. The plaintiff continued to act as traveler for the defendants after the bankruptcy. The judgment of the Exchequer Chamber in *Drake* v. *Beckham* (1843) 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, 7 Jur. 204, and the opinions of the judges who advised the House of Lords in that case, (1849) 2 H. L. Cas. 579, 13 Jur. 921, place this matter beyond doubt. Further, there was not at the date of the bankruptcy any accrued right of action under the contract which might have vested in the trustee as in *Beckham* v. *Drake* (1849) 2 H. L. Cas. 579, 13 Jur. 921. So far as I am aware, there is no authority inconsistent with the view that I have expressed; and I think that the decision of the learned judge was right, and that this appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *Charles Goble Champion.*

Solicitors for defendants: *Gush, Phillips, Walters, & Williams.*

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Note.—Contracts for personal services, earnings thereunder, and causes of action for their breach, as assets in bankruptcy.

Summarily stated, the decision in BAILEY v. THURSTON & Co. amounts to this, that though a contract for the rendition of personal services by the bankrupt does not vest in his trustee, a cause of action for a breach thereof occurring before bankruptcy, or after adjudication and before discharge, is an asset available to creditors, though in the case of a breach after adjudication the bankrupt may maintain an action thereon so long as the trustee does not intervene.

Under the English bankruptcy acts the property of the bankrupt divisible amongst his creditors includes not only property which belongs to him at the commencement of the bankruptcy, but also property which may be acquired by or devolve on him before his discharge (see 2 Laws of England [Halsbury] p. 164), with the exception, ingrafted by the courts, of personal earnings so far as necessary for the maintenance of the bankrupt and his family (see *Re Roberts* [1900] 1 Q. B. 122, 69 L. J. Q. B. N. S. 19, 48 Week. Rep. 132, 81 L. T. N. S. 467, 16 Times L. R. 29, 7 Manson, 5). This note does not extend to a consideration of the question as to what earnings may be considered as personal for the purpose of this exception, this branch of the inquiry having no value for the American lawyers.

Under the American bankruptcy act, property acquired after adjudication is not considered as assets. "The estate which vests in a trustee in bankruptcy, to be collected and distributed to creditors, is that which belonged to the bankrupt at the time of the commencement of the proceedings in bankruptcy. Whatever the bankrupt may acquire after that date, whether by inheritance, devise, or gift, or as the fruit of his own industry and skill, even though it may be acquired while the bankruptcy proceedings are still pending and before the discharge, is his own peculiar property. It is not subject to be administered in the bankruptcy proceedings; it is not within the jurisdiction of the bankruptcy court; it is not liable to the claims of any creditors whose claims were provable (whether actually proved or not) in the bankruptcy proceedings. The only limitation upon this rule is that, if the bankrupt fails to secure his discharge (or, as to any debts not released by his discharge), his after acquisitions may be subjected to the satisfaction of creditors, but by the ordinary processes of law, and not with any relation to the proceedings in bankruptcy." Black, Bankr. § 236. The question whether compensation earned under a contract for personal services, or a cause of action for its breach, is an asset, will therefore arise in the United States only

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in respect to earnings or a breach of the contract of employment prior to the bankruptcy.

An incompleted contract for personal services, involving the exercise of skill upon which reliance was had, does not pass to the trustee. *Mersfelder* v. *Peters Cartridge Co.* (1910) 32 Ohio C. C. 187.

A contract for the performance of personal services is not "property" within the provision of a bankrupt act that "all the property and rights of property of every name and nature" of every bankrupt shall, by mere operation of law, be vested in such assignee as may be appointed. *Streeter* v. *Sumner* (1855) 31 N. H. 542.

Upon an adjudication in bankruptcy the right to demand the value of services rendered by the bankrupt passes to the assignee where the bankrupt act vests in such assignee, among other things, "all rights in equity" and "choses in action" of the bankrupt, and "all debts due him or any person for his use, and all liens and securities therefor; all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract," etc. *Buckingham* v. *Buckingham* (1880) 36 Ohio St. 68.

So, also, in *Rand* v. *Sage* (1905) 94 Minn. 344, 102 N. W. 864, a claim for personal services rendered prior to the adjudication in bankruptcy was regarded as part of the assets.

In *Burton* v. *Lockert* (1849) 9 Ark. 411, it was held that under a bankruptcy statute declaring that "the assignee in virtue of the decree of bankruptcy shall become invested with all the property and rights of property of the bankrupt and shall be vested with all the rights, titles, powers and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy," a claim for personal services passed to the assignee, though at the date of the petition such claim had not matured into a debt, the contingency upon which it was made to depend not having then happened.

The interest of an insurance agent in the commissions to accrue on renewal premiums, under a contract which provided for payment to him of commissions on the first year and renewal premiums received by the company on policies secured by him, is property which passes to his trustee in bankruptcy, such commissions having been earned by the bankrupt prior to filing his petition, even though some additional services in the way of mailing notices and collecting of the premiums were thereafter to be performed in relation thereto, the rendition of such services not involving a relation of confidence and trust, as evidenced by a provision in the contract between the agent and the insurance company for the employment of a cashier whose

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business it should be to collect premiums, and by a provision for the payment of such commissions, in event of the agent's death, to his widow or legal representatives. *Re Wright* (1907) 18 L.R.A.(N.S.) 193, 85 C. C. A. 206, 157 Fed. 544, affirming 151 Fed. 361.

In *Re Jones* (1871) Fed. Cas. No. 7,448, it was held that where the bankrupt had rendered services as an attorney in a partition suit under an ordinary retainer, his compensation not being contingent upon final success or upon the final proceedings in the partition, his fee should be apportioned between himself and his assignee in bankruptcy in proportion to the value of the services rendered before and after the bankruptcy.

Compensation for services rendered after the petition in bankruptcy was filed does not vest in the trustee. *Mersfelder* v. *Peters Cartridge Co.* (1910) 32 Ohio C. C. 187.

Salary earned by a bankrupt after adjudication and pending discharge does not belong to his estate. *Re Gillespie* (1913) 209 Fed. 1003; *Re Green* (1914) 213 Fed. 542; *Progressive Bldg. & L. Co.* v. *Hall* (1914) 135 C. C. A. 613, 220 Fed. 45.

In *Beckham* v. *Drake* (1849) 2 H. L. Cas. 579, 13 Jur. 921, it appeared that the plaintiff had entered into a contract of service for a term of seven years at fixed wages, "the party making default to pay to the other the sum of 500*l.* by way of or in the nature of specific damages." He was dismissed, became bankrupt, and after bankruptcy brought an action of assumpsit upon the agreement for the sum stipulated. This raised the question whether his right of action had passed to his assignees in bankruptcy. The question was submitted to the common-law judges, who were divided in opinion, seven of them being of the opinion that it did pass, and two of the opinion that it did not. The House of Lords sided with the majority of the judges, though it was intimated that if the agreement had been without a penalty, or an action had been brought for unliquidated damages, it would have been a case of very great doubt, the damages in such case being by way of compensation for what the bankrupt would suffer subsequently to the bankruptcy, and if damages awarded to him and received in respect of what had taken place subsequently to the bankruptcy were to go to the assignees, that would really be making the bankrupt a slave to be hired out for the benefit of his creditors.

A sum of money awarded in lieu of a proper notice of dismissal from employment after bankruptcy, but before discharge, is compensation awarded for breach of contract, and not money earned by the bankrupt's personal services, and therefore becomes part of his estate. *Wadling* v. *Oliphant* (1875) 1 Q. B. D. 145, 45 L. J. Q. B. N. S. 173, 33 L. T. N. S. 837, 24 Week. Rep. 246.

A cause of action for damages for an alleged wrongful dismissal

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of the bankrupt from employment as an architect under a contract made prior to his being adjudicated bankrupt passes to his trustee. *Emden* v. *Carte* (1881) 17 Ch. D. 768, 51 L. J. Ch. N. S. 41, 44 L. T. N. S. 636. E. S. O.

[NOVA SCOTIA SUPREME COURT.]

CONRAD v. CORKUM
and
WHITFORD v. CORKUM.

35 N. S. 288.

Fraudulent conveyance — Validated by assignment for valuable consideration — Giving time — Right to priority — Future support not sufficient to support deed.

In 1877, C. made a conveyance, by way of mortgage, to H. The conveyance was made without consideration, and in fraud of creditors, and was avoidable as against creditors and subsequent purchasers for valuable consideration.

In 1896, H., at the request of C., assigned the mortgage so made to W., who was a creditor of C., and pressing for payment.

Held, that the mortgage, although fraudulently made in the first instance, was validated by the assignment to W., for valuable consideration.

Held, that the giving of time by W. to C., in connection with the antecedent indebtedness, was sufficient consideration to support the assignment.

Held, nevertheless, that the validating of the mortgage would not affect the right to priority of the party claiming under a second mortgage made by C. previously to the assignment to W.

Held, also, following *McNeil* v. *McPhee* (1898) 31 N. S. 140, that a deed made by C., the sole consideration for which was the future support of the maker and his wife by the grantee, was not founded upon valid consideration, within the statute of Elizabeth.

(May 6, 1902.)

Before McDonald, Ch. J., Weatherbe, Ritchie, and Meagher, JJ.

APPEAL from the following judgment of Graham, E. J.:

The defendant Corkum, with the intent of defeating a creditor who had a judgment maturing against him, gave, on the

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4th of January, 1877, a mortgage of a lot of land at Chester to one George Hatt, now deceased. The consideration purported to be the sum of $500, but it is abundantly proved that there was no consideration whatever for the giving of the mortgage. The execution was defeated.

Afterwards Whitford had transactions with Corkum, in connection with a vessel owned by the former and sailed by the latter. So that, according to Whitford, Corkum owed him $450 due on account of earnings, a further unsettled sum on that account, a note for $128, and he had a claim against him also for the price of a share of the vessel, which he agreed to sell to Corkum for $435.

Whitford was pressing Corkum to secure his indebtedness by giving him this mortgage. There is some difference in the testimony. Corkum says he went to Hatt, got the [289] mortgage, and gave it to Whitford, and that he knew nothing of the written assignment of it, which Hatt executed, until long afterwards. Whitford says that Corkum knew of it, and that it was he who told Hatt to come and execute it, although he admits that Corkum was not there when it was executed.

It bears date the 16th of January, 1896. Six years' interest was added to the principal, and the assignment purported to be for that sum. Corkum did not execute it. There was no consideration for the assignment as between Whitford and Hatt. Whitford says that he had no knowledge of the want of consideration between Corkum and Hatt.

Before this, on the 31st December, 1892, a good mortgage was given by Corkum to one Naas, for the sum of $125, and was registered.

On the 28th July, 1898, this mortgage was transferred by Naas to Conrad, for consideration.

On the 27th December, 1897, Corkum conveyed to his daughter, Mrs. Maud Conrad, the wife of Rufus Conrad, the equity of redemption, the consideration being a bond for the maintenance of Corkum and his wife.

Two actions are before me, one by Whitford for foreclosure and sale, the other by Rufus Conrad to have the priority of the Naas mortgage over the security of Whitford established.

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It is clear that if Whitford had given Hatt any consideration for the mortgage, it would have been a good security to the extent of that consideration. *Newport's Case,* Cases in the Time of Holt, 477. In that case, I understand, the transfer was made without the concurrence of the mortgagor. Here take Conrad's evidence, namely, that he got the mortgage from Hatt, and gave it to Whitford as security, with Hatt's concurrence. This would, I suppose, be a good, equitable mortgage, as Corkum could not get it released on the registry without payment, and Whitford had the right to get the legal title any way he could.

Or take Whitford's evidence that Corkum concurred in the assignment from Hatt; the result is the same. It is true that Whitford, in one sense, takes the assignment under Hatt, but he also takes it from Corkum. There is, [290] I think, consideration between Whitford and Corkum. There is the antecedent debt, and while there is no agreement to give time to be inferred from the face of the assignment, there is a sort of forbearance between the time when Corkum agreed to give him the mortgage and the time he got it. *Alliance Bank v. Broom* (1864) 2 Drew. & S. 289, 5 New Reports, 69, 34 L. J. Ch. N. S. 256, 10 Jur. N. S. 1121, 11 L. T. N. S. 332, 13 Week. Rep. 127.

If consideration given by Whitford to Hatt would make it a good security, then *a fortiori,* consideration moving directly from Whitford to Corkum would have that effect.

It is also clear that in respect to intervening liens which matured before the assignment, and the consideration which made it a good security, they have priority. *O'Donovan* v. *Rogers* (1857) 7 Ir. Ch. Rep. 1.

The plaintiff Conrad in his action will therefore be entitled to the relief prayed for, with costs, and the plaintiff Whitford will have leave to amend his statement of claim by inserting a provision offering to redeem the holder of the Naas mortgage, and will have foreclosure and sale, unless the sum of $500, the face of the mortgage, and interest for six years before action, and subsequent interest, are paid. The addition of the six years' interest to the principal in the assignment which was made between Hatt and Whitford's solicitor does not bind Corkum or his assigns. If the proceeds of the sale do not cover

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Whitford's claim and costs, the costs will be paid out of any separate estate of Mrs. Conrad, and by Corkum personally, but not by defendant Conrad, who was only joined as the husband.

F. B. Wade, K.C., in support of appeal. Maud Conrad, it is admitted, knew that the $500 mortgage was voluntary. Knowing this, and that she had the right to set it aside, she could not rest on her rights, and permit a third party to buy that mortgage in good faith. *O'Donovan* v. *Rogers* (1857) 7 Ir. Ch. Rep. 1, would have been this case if the mortgage had remained in the hands of Hatt, and there could be no question as to the priority of the second mortgage. The deed to Maud Conrad was a voluntary deed, and this is the case of one volunteer going against another. *McNeil* v. *McPhee* (1898) 31 N. S. 140. [291] Maud Conrad did not get her deed until the assignment to Whitford, which was for consideration. *Dalglish* v. *McCarthy* (1872) 19 Grant Ch. (U. C.) 578; Coote on Mortgages, 89; May on Fraudulent Conveyances, 199, 240; Robbins on Mortgages, 821. If consideration is given before any steps are taken to impeach a volunteer conveyance, the right to attack it is lost. May, pp. 317, 323; *Daubeny* v. *Cockburn* (1816) 1 Meriv. 636, 15 Revised Rep. 174; *Morewood* v. *South Yorshire R. Co.* 3 Hurlst. & N. 798, 28 L. J. Exch. N. S. 114.

James A. McLean, K.C., *contra,* and in support of appeal in Whitford v. Corkum. The mortgage from Corkum to Hatt was given in fraud of creditors, and is void. Whitford, by no arrangement, could take any greater interest than Hatt had. There is a distinction between mortgages and deeds in this country. Mortgages are held to be mere securities for money. Nothing between Hatt and Whitford could validate the void mortgage. When the mortgage was assigned to Whitford, Corkum was not a party to the transaction, and he knew nothing about it. In order to make out an equitable mortgage, it must be shown that there was a novation. There was no forbearance by Whitford in respect to Corkum, and a bad mortgage cannot be made good as against third parties by an antecedent debt. *Alliance Bank* v. *Broom* (1864) 2 Drew & S. 289, 5 New Reports, 69, 34 L. J. Ch. N. S. 256, 10 Jur. N. S. 1121, 11

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L. T. N. S. 332, 13 Week. Rep. 127, 15 Am. & Eng. Enc. of Law, p. 757, note 6. The mortgage to Charlotte Naas was for value prior to the assignment to Whitford, and Rufus Conrad stands exactly in her position. *Parker* v. *Clarke* (1861) 30 Beav. 54, 7 Jur. N. S. 1267, 9 Week. Rep. 877; *Matthews* v. *Wallwyn* (1798) 4 Ves. Jr. 118, 18 Eng. Rul. Cas. 244; Kehoe's Choses in Action, pp. 48, 77, 78; 15 Am. & Eng. Enc. Law, p. 777; *Perry-Herrick* v. *Attwood* (1857) 2 DeG. & J. 31, 27 L. J. Ch. N. S. 121, 4 Jur. N. S. 101, 6 Week. Rep. 204; *London Loan Co.* v. *Smyth* (1882) 32 U. C. C. P. 530.

F. B. Wade, K.C., *contra*, and in reply. Whitford agreed to forbear, and did so. A pre-existing debt is good consideration for a conveyance, and will support it as against a subsequent purchaser for value. 14 Am. & Eng. [292] Enc. Law, 2d ed. p. 470. A conveyance in fraud of creditors is not void, but merely voidable. *Bean* v. *Smith* (1821) 2 Mason, 273, Fed. Cas. No. 1,174; *Dolphin* v. *Aylward* (1870) L. R. 4 H. L. 486, 23 L. T. N. S. 636, 19 Week. Rep. 49. A mortgagee is not a creditor within the meaning of 13 Eliz. *Crombie* v. *Young* (1894) 26 Ont. Rep. 194; May on Fraudulent Conveyances, 163, 164; *Lush* v. *Wilkinson* (1800) 5 Ves. Jr. 384; *Hales* v. *Cox* (1863) 32 Beav. 118, 8 L. T. N. S. 134, 11 Week. Rep. 331, 1 New Reports, 344; May, 317 *et seq.* It is only necessary for us to show that the deed to Maud Conrad was without consideration.

James A. McLean, K.C., in reply. *Lloyd* v. *Attwood* (1858) 3 DeG. & J. 614, 29 L. J. Ch. N. S. 97, 5 Jur. N. S. 1322.

Ritchie, J., delivered the judgment of the court:

These two suits are between the same parties, and in relation to the same property. They were tried and argued together, and the judgment given by the learned trial judge decides both suits. It does not appear that any of the material facts are in dispute, and they are so fully set out in the judgment from which the appeals are taken, that it is unnecessary to repeat them here. There can be no doubt but that the conveyance from David Corkum to Hatt, given on the 4th January, 1877,

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was in fraud of creditors, without consideration, and voidable as against the creditors of Corkum and subsequent purchasers for valuable consideration. It was not registered until May, 1879. It is also clear that the mortgage given by Corkum to Naas, in December, 1892, was for valuable consideration, and constituted a valid claim on the property. This mortgage was assigned by Naas to Rufus Conrad, on the 22d September, 1898, for a valuable consideration, and both the mortgage and assignment were registered shortly after their respective dates. It is a well-established principle that a deed such as the one from Corkum to Hatt, which was fraudulent in its creation, may be made valid by matter *ex post facto,* except in the case of a deed [293] void *ab initio,* and not merely voidable, as in the case before us. One of the principal questions in this case is whether or not this deed had subsequently been made valid. Previous to January, 1896, Corkum was indebted to Whitford in a sum exceeding $400, and Whitford was pressing for payment or security on his property. Corkum told him about this mortgage to Hatt, and that it was without consideration, and, on Whitford's threatening to put him to trouble unless something was done, Corkum went to Hatt, got this mortgage, and gave it to Whitford.

An assignment of this mortgage from Hatt to Whitford was prepared, and executed by Hatt on the 16th January, 1896. Corkum denies that he knew there had been an assignment of the mortgage until two years after, or that he had asked Hatt to execute it, but on these points I think the evidence of Whitford and his witnesses is the most reliable, and that the mortgage was assigned by Hatt to Whitford, at the instance and on the request of Corkum, as a security for payment of the money due by him to Whitford. No case was cited exactly like this, nor have I found any, but it is, I think, clear from the decided cases that if the consideration for the assignment proceeded from Whitford to Hatt, the security would have been made valid. If Hatt had reconveyed to Corkum, and he had then mortgaged to Whitford, the transaction would have been valid, and there seems to me to be no difference in principle between that case and the one before us, where Hatt, who had the legal title only,

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assigned the mortgage to Whitford, at the request of Corkum, who had received the consideration, and who was the party really interested. The making of this mortgage valid by an *ex post facto* consideration in 1896 would not affect the mortgage given by Corkum to Naas, in 1892, which would retain its priority. See *O'Donovan* v. *Rogers* (1857) 7 Ir. Ch. Rep. 1.

Maud Conrad claims property as against Whitford, [294] under a deed from Corkum, dated the 27th December, 1897, and recorded the same day, and she also contended that the *ex post facto* consideration, being an antecedent debt, did not make Whitford a purchaser for a valuable consideration. That is true, but the giving of time, however short, is a valuable consideration, and, in my opinion, Whitford, in this case, gave time to Corkum, in addition to the consideration of the antecedent debt, and the case is within the principle established by *Alliance Bank* v. *Broom* (1864) 2 Drew & S. 289, 5 New Reports, 69, 34 L. J. Ch. N. S. 256, 10 Jur. N. S. 1121, 11 L. T. N. S. 332, 13 Week. Rep. 127. See also judgment of Fry, J., in *Cracknell* v. *Janson* (1878) 11 Ch. D. at page 10, 48 L. J. Ch. N. S. 168, 40 L. T. N. S. 640, 27 Week. Rep. 851, 18 Eng. Rul. Cas. 68. But if Whitford is not a purchaser for a valuable consideration, neither is Maude Conrad, and she can gain no priority over him in that respect. The sole consideration for her deed is the future maintenance of Corkum and his wife during their respective lives, and this court has decided in the case of *McNeil* v. *McPhee* (1898) 31 N. S. 140, that such a consideration was not a valuable consideration within the meaning of the statute of Elizabeth.

In my opinion, the learned trial judge was right in the conclusions at which he arrived in both cases, and the appeals should be dismissed, with costs.

Appeals dismissed, with costs.

Note.—Validity of title or lien acquired by creditor of fraudulent transferrer through fraudulent transferee.

Inasmuch as at common law a debtor, though insolvent, may pay one creditor in full to the prejudice of the others, and as it is also an established principle that the law favors the diligent creditor to the extent of upholding a lien or transfer obtained by him from his

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debtor as security for, or in payment of his debt, it becomes a question whether such lien or transfer is likewise to be upheld when obtained through one to whom the debtor has transferred property in fraud of creditors, or whether such subsequent transaction is tainted by the invalidity of the original transfer. To this question, upon which there is a conflict of opinion, the scope of the present note is confined, not extending to a discussion of the circumstances under which such a transaction may become voidable as a preferential transfer.

It may be noted in passing, however, that it has been held that a conveyance to a creditor of the transferrer by the fraudulent transferee in payment of the debt may, however, be set aside as preferential equally as where such a conveyance is made directly by the debtor. *Kilgour* v. *Rosenfelt* (1914) 25 Manitoba L. Rep. 22, 19 D. L. R. 427.

Except in Illinois, the courts which have had occasion to pass on the question under discussion have upheld the validity of the title or lien acquired by a creditor from the fraudulent transferee. And though the circumstances involved in some of the cases have led to an enunciation of the decision therein in a more restricted form, it has been generally held immaterial that the creditor knew the transfer to be fraudulent, or that the transaction took place without the debtor's concurrence. In *Rilling* v. *Schultze* (1902) 95 Tex. 352, 67 S. W. 401, it is said: "The ground upon which the rule seems to rest is that the fraudulent grantor can assert no claim against the property, but that the creditors can, and that if a creditor can procure a satisfaction of his claim by a purchase of the property from the grantee or have the latter secure it by a mortgage of the property, it is not necessary for him to resort to legal proceedings. It seems reasonable to hold that the grantee may do what he may be compelled to do by suit; and that in such a case other creditors have no right to complain, since it is, in every such case, a race of diligence between them, and the one who gets the first lien is entitled to priority in payment."

In a number of cases it has been held that where a debtor has conveyed real estate in fraud of his creditors, and at his request his grantee has given a mortgage thereon to secure a debt of the grantor which existed at the time of the conveyance, to a creditor ignorant of its fraudulent character, the mortgage comes within the exception in the statute of frauds protecting the right of purchasers in good faith and for a valuable consideration. And though the conveyance be set aside in an action brought by other creditors, the mortgage cannot be affected. *Murphy* v. *Briggs* (1882) 89 N. Y. 446; *Royer Wheel Co.* v. *Frost* (1885) 13 Daly, 233; *Munoz* v. *Wilson* (1888) 111 N. Y. 295, 18 N. E. 855; *Brooks* v. *Wilson* (1889) 53 Hun, 173, 6 N. Y. Supp. 116.

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It is immaterial in such a case whether the mortgage is given directly to the creditor, or in trust for a number of creditors. *Royer Wheel Co.* v. *Frost* (1885) 13 Daly, 233.

In *Petingale* v. *Barker* (1892) 21 D. C. 156, it was held that a creditor accepting in good faith a deed of trust on property, without knowledge of any fraudulent purpose on the part of the debtor in conveying the property to his wife, was entitled to a lien paramount to that of a judgment creditor.

So, also, in *Keith* v. *Proctor* (1874) 8 Baxt. 189, it is held that a mortgage made by a fraudulent transferee to secure a creditor of the transferrer is valid where there is nothing to show the latter's participation in any fraudulent purpose.

In *Johnson* v. *Trust Co. of America* (1900) 43 C. C. A. 458, 104 Fed. 174, it is held that a creditor who is aware that his debtor had conveyed his property to a third party for the purpose of defrauding his creditors, but who has no intent to aid him in his fraud, may with his consent procure from the fraudulent vendee the payment of his debt from the property fraudulently conveyed, or a lien upon that property to secure his just claim, which will be unassailable by the other creditors of his debtor.

In *Agricultural Bank* v. *Dorsey* (1841) Freem. Ch. 338, a mortgage made by a fraudulent grantee to secure a debt owing by the grantor was held valid as against other creditors seeking to set aside the original conveyance.

In *Beam* v. *Bennett* (1883) 51 Mich. 148, 16 N. W. 316, it was held that mortgages given by the fraudulent transferee to bona fide creditors of the transferrer who were entirely free from all fault and misdoing, were not so tainted by the fraudulent transfer as to be voidable at suit of a subsequent judgment creditor as against whom a mortgage previously executed directly by the debtor would have been valid.

In *Longfellow* v. *Barnard* (1899) 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255, it was held that a mortgage originally given in fraud of creditors and subsequently assigned to secure a bona fide creditor of the mortgagor was valid as against a receiver of the debtor's property, although the assignment was made without express authority from the debtor, and though the creditor knew or ought to have known that the original mortgage was made for the purpose of defrauding creditors; the court saying that such a transaction was in substance a restoration of the property to the owner and the execution by him of a mortgage thereon to secure the just claim of a creditor, so as to effectually purge the mortgage of the fraud with which it was originally tainted and make it a valid and enforceable security.

In *Mahoney* v. *McWalters* (1896) 3 App. Div. 248, 38 N. Y. Supp.

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256, where a building contractor procured a person for whom he had built a house to execute a mortgage to his wife for the balance due him, and the wife thereafter assigned it as security for certain debts of her husband, it was held that though under the circumstances the mortgage was fraudulent and void as to the contractor's creditors, it created a valid lien to the extent of the debts owing to the creditors to whom it had been assigned before the filing of a mechanics' lien on the premises; but that such mortgage, except so far as pledged to such creditors, being void as to the lienor, the fraudulent mortgagee could not give it vitality and effect by assignment, even to bona fide creditors, after the right of the lienor had become vested.

In *Thompson* v. *Williamson* (1904) 67 N. J. Eq. 212, 58 Atl. 602, an action to subject certain lands to the claim of a judgment creditor, it appeared that a portion of the property alleged to have been conveyed by the debtor to his wife in fraud of creditors had been subsequently conveyed by them in payment of debts of the judgment debtor or in discharge of liens on the lands in question existing before the recovery of the complainant's judgment. It was held that the entire transaction of the voluntary conveyance to the judgment debtor's wife and subsequent conveyance of a portion of it to creditors substantially amounted to a preference of such creditors over others, both debts existing at the same time, which was neither illegal nor fraudulent.

In *Butler* v. *White* (1879) 25 Minn. 432, where a debtor with intent to defraud his creditors transferred personal property to another, and before any other creditor had acquired a lien on the property a creditor entered into an arrangement with him and the fraudulent transferee pursuant to which the latter transferred the property to the creditor in payment of the debt, it was held that if this arrangement was made in good faith the transfer was valid as to other creditors, although the creditor taking the transfer knew of the fraudulent character of the first transfer.

In *Brown* v. *Scheffer* (1898) 72 Minn. 27, 74 N. W. 902, it was held that an assignee for creditors could not maintain an action of replevin to recover a stock of goods which had been turned over to a creditor of the transferrer by the fraudulent transferee in payment of his debt, without any intention on the part of his debtor to give such creditor a preference, the court saying: "If the rights of other creditors seem to conflict with this rule, our answer is, that ordinarily the diligent creditor is entitled to the fruits of his diligence. John F. Franke [the debtor] might himself have turned this identical property over to the defendants in payment of their debt, if done without any intent to give them a preference. There is a moral, as well as a legal, obligation upon the part of a debtor to pay his just debts; and when he does so out of his own means, or through a fraud-

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ulent vendee, without intending to give one creditor a preference over another, upon sound principles it ought to be held valid."

That a mortgage given by the fraudulent transferee of a stock of goods to a creditor of the transferrer is valid, see also *Webb* v. *Brown* (1854) 3 Ohio St. 246; *Brown* v. *Webb* (1851) 20 Ohio, 389.

In *Boyd* v. *Brown* (1835) 17 Pick. 453, it was held that where property transferred in fraud of creditors was subsequently, with the debtor's consent, conveyed to a creditor, the latter's title was confirmed and the fraud in the original conveyance was purged.

In accordance with the principle underlying the foregoing cases, it has been held that where the fraudulent transferee on conveying his property takes back a mortgage to himself as trustee for certain persons to whom he is indebted, a court of equity, in setting aside such conveyance on a creditor's bill, will allow the mortgage to stand on behalf of the *cestuis que trustent*. *First Nat. Bank* v. *Cummins* (1885) 39 N. J. Eq. 577.

That, as above stated, it is immaterial that the creditor taking the mortgage knew the transfer to be fraudulent, see *Butler* v. *White* (1879) 25 Minn. 432; *Longfellow* v. *Barnard* (1899) 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; *Brown* v. *Webb* (1851) 20 Ohio, 389; *Webb* v. *Brown* (1854) 3 Ohio St. 246; *Rilling* v. *Schultze* (1902) 95 Tex. 352, 67 S. W. 401; *Johnson* v. *Trust Co. of America* (1900) 43 C. C. A. 458, 104 Fed. 174; and cases following. In *Dolan* v. *Van Demark* (1886) 35 Kan. 304, 10 Pac. 848, it was held that while generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, or transfer or assign the same even to a person who has no such notice, where the consideration for such transfer or assignment is merely the payee's pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a bona fide purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor either in payment or partial payment of a bona fide debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. So, also, in *Copenheaver* v. *Huffaker* (1845) 6 B. Mon. 18, it is held that a bona fide creditor of a fraudulent grantor, though believing, from his knowledge of the parties and attending circumstances, that the grant was a fraud upon him and other creditors, may, if he had no connection with the fraud itself, honestly take a mortgage from the fraudulent grantee to secure his own just demands against the fraudulent grantor; and if such mortgage be taken in good faith to secure his own debt without any view to aiding in the consummation of the fraud as to other cred-

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itors, or to defeat them further than is necessarily implied in securing the preference to himself, a court of equity should not postpone him to other creditors having no lien at the time, but coming in afterwards to subject the property to their claims, on the ground of the original fraud. In *Murphy* v. *Briggs* (1882) 89 N. Y. 446, it is held that the fact that the creditor had notice at the time the mortgage was delivered, though not at the time of its execution, of the facts and circumstances in relation to the fraudulent conveyance and of the debtor's insolvency, does not affect his right to the preference created by the mortgage.

But where a voluntary conveyance made to defraud creditors is not invalid as to subsequent creditors, they have no more rights with reference to the property than any other purchaser, and the grantee can no more give a lien to a subsequent creditor who has notice of the fraud, which will be valid as against creditors at the time of the conveyance, than he can sell to a purchaser with such notice. *Rilling* v. *Schultze* (1902) 95 Tex. 352, 67 S. W. 401.

That the concurrence of the fraudulent grantor is not necessary to the validity of the mortgage or sale by the grantee, see *Longfellow* v. *Barnard* (1899) 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; *Webb* v. *Brown* (1854) 3 Ohio St. 246; and *Rilling* v. *Schultze, supra.* As said in *Webb* v. *Brown, supra,* "a conveyance by a fraudulent vendee of goods in payment or security of the vendor's debt requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property. No just preference of creditors can be thus defeated; since in every case in which the claim of the creditor is fair, the law would reward the greater vigilance of the creditor, and deny to any other creditor a preference resting in the favor of the vendor himself. Nor can the vendor suffer by allowing such a right in his vendee; for if the consideration remain unpaid, he can well question the amount to be paid by the vendee, if the whole fraud has been removed on his own part; and if the consideration be wholly paid, the vendee would pay at his own immediate expense and his own ultimate peril."

The assent of the debtor, though not a thing essential to the soundness of the mortgage, is additional evidence of its good faith. *Ibid.*

But in Illinois it is held that a creditor of the fraudulent transferrer cannot acquire a valid title or lien as against the claims of other creditors by taking from the fraudulent transferee a transfer or conveyance of, or lien upon, the property in payment of or as security for his debt when the fraud was known to him, although he was no party thereto (*Waggoner* v. *Cooley* (1855) 17 Ill. 245; *Jewett* v. *Cook* (1876) 81 Ill. 260); and the consent of the debtor to such a conveyance does not purge the title of fraud and vest it, clean and valid, in the creditor (*Hoff* v. *Larimore* (1902) 106 Ill. App. 589,

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where the court said: "While the law of this state permits an insolvent debtor to prefer and pay one creditor in full to the exclusion of all others, still until such preferred creditor is legally secured, or payment to him is actually made, no mere desire, consent, or promise on the part of such debtor will avail. As between appellant and James W. [the fraudulent transferrer] and Josephine Larimore [the fraudulent transferee] his title in equity we think is and ought to be good, but as between himself and other creditors of James W., his title is not, and we think in equity and under the facts of this case ought not to be, any better than it was in Josephine. With full knowledge he accepted Josephine's title in payment of his demands, and a court of equity ought not, at the expense of other creditors, to give him more"). E. S. O.

[PRIVY COUNCIL.]

COLONIAL BANK OF AUSTRALIA, LIMITED, *Defendants,* v. MARSHALL and Another, *Plaintiffs.*

[1906] A. C. 559.
Also Reported in 75 L. J. P. C. N. S. 76, 22 Times L. R. 746.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Banker and customer — Cheques drawn with spaces, afterwards fraudulently filled up — Liability of bank — Duty of customer — Negligence.

Held, that the mere fact that a cheque is drawn with spaces which can be utilized for the purpose of fraudulent alteration is not by itself any violation of duty by the customer to his banker.

Five cheques were drawn on the defendant bank by the two plaintiffs and defendant M. to the debit of their joint account. After they were signed by the plaintiffs, M. enhanced their apparent amounts by adding words and figures in the blank spaces to the left of those originally written.

In a suit to recover the balance of account the bank claimed to debit it with the enhanced amounts of the cheques, and the jury found that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered, and that the cheques were drawn by the plaintiffs in neglect of their duty to the bank:—

Held (affirming the High Court), that there was no evidence of negligence on the part of the respondents proper to be left to the jury.

Scholfield v. *Earl of Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124, followed.

(July 27, 1906.)

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Present: The Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills.

APPEAL by special leave from a decree of the High Court (October 27, 1904), reversing a decree of the Supreme Court of Victoria (June 7, 1904), which had affirmed the judgment of Madden, Ch.J., for the appellants at the trial.

The action was brought in effect, under the circumstances stated in their Lordships' judgment, to recover 450*l.*, the amount which the bank had, as the plaintiffs alleged, negligently and without reasonable care and skill paid in respect of cheques drawn by them, which afterwards had been fraudulently altered and increased to that extent without their authority. The bank pleaded that the cheques had been drawn without reasonable care [560] and precaution, and in a manner and form so negligent that they had enabled and permitted the alterations to be made, that it paid them in good faith, and that the plaintiffs were estopped from alleging that any of the cheques had been fraudulently altered. The Chief Justice directed the jury that if a customer draws or signs or issues cheques on his banker in a manner which the jury thinks so negligent that it induced or caused opportunity to or was a temptation to a person desirous of effecting a forgery to effect that forgery so that a banker is exposed to the payment of a larger sum than the customer intended, then the customer is precluded and estopped from complaining and showing that the banker paid a forged and altered cheque.

Judgment was entered for the bank in accordance with the verdict, and the Supreme Court of Victoria affirmed it on appeal. They also treated the case as one of estoppel by reason of the negligence of the customer in drawing cheques capable of subsequent alteration, and in such an unusual way as to afford facilities for fraud.

The High Court of Australia reversed this judgment. "The substantial question for our decision is whether the mere failure to take precautions against forgery is a breach of the implied duty by a customer to his banker. If it is it would appear prima facie that a similar duty must be implied in the case of all contracts in which the duties of one party arise upon written communications from the other." They referred to *Union Credit*

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Bank v. *Mersey Dock* [1899] 2 Q. B. 205, 68 L. J. Q. B. N. S. 842, 81 L. T. N. S. 44, 4 Com. Cas. 227, and added: "If the doctrine applies to the case of a cheque, it must also apply to the acceptor of a bill as between him and the drawer, and it should in principle apply to every case in which one man by a written communication requires or requests the performance of some act or duty by another. There is no trace of any such doctrine to be found in the English law, but the contrary rule—that a forgery is a nullity—is well established. A fraudulent exercise of an actual and apparently unlimited authority, however created, is of course not a forgery in the sense in which that term is here used." In the judgment of the High Court, "when a [561] person signs a writing which is on the face of it a complete document and issues it to another, he is not bound by any subsequent alteration of it made without his authority, and such authority cannot be inferred merely from the existence of blank spaces in the document. It may well be that the existence of blank spaces combined with other circumstances, either intrinsic to the document or extrinsic, may be evidence of delegated authority to fill them up. But the mere existence of a blank is not sufficient. It follows that the *dictum* of the learned Chief Justice—so far as it laid down that if a cheque is so drawn as to invite or afford opportunity for or temptation to forgery the customer is estopped from complaining of the forgery—cannot be supported."

On the question whether there was in the present case any evidence to be left to the jury of negligence or breach of duty on the part of the respondents, the High Court said: "The cheques, as already said, were on their face complete documents; the words denoting the amount began with a capital letter, and the person by whom they were filled up was a person with whom the plaintiffs had had dealings for many years and whose honesty they had no reason to suspect. The cheques were, however, capable of fraudulent alteration. Under these circumstances there was, in our opinion, no evidence to go to the jury of any breach of duty such as would give rise either to estoppel or to a claim for damages."

Cohen, K.C., **Lush**, K.C., and **Butterworth**, for the appellants, contended that the duty of a customer to his banker was to

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exercise ordinary and reasonable care in drawing cheques so as to protect his banker against the risk of paying a larger sum than was intended. Whether the respondent did so or not was a question for the jury, and the respondents were bound by that finding. Here one of the drawers himself committed the fraud, and the plaintiffs under the circumstances were bound to indemnify the bank against the loss resulting therefrom. Of two innocent persons the one who gives opportunity for the fraud must suffer. They referred to *Young* v. *Grote* (1827) 4 Bing. 253, 12 J. B. Moore, 484, 5 L. J. C. P. 165, 29 Revised Rep. 552; *Bank* [**562**] *of England* v. *Vagliano* [1891] A. C. 107, 123, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695; *Nash* v. *De Freville* [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 48 Week. Rep. 434, 82 L. T. N. S. 642, 16 Times L. R. 268; *Hogg* v. *Skeen* (1865) 18 C. B. N. S. 427, 34 L. J. C. P. N. S. 153, 11 Jur. N. S. 244, 11 L. T. N. S. 709, 13 Week. Rep. 383; *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124; *Adelphi Bank* v. *Edwards* (1882) 26 Sol. Jo. p. 360, cited in *Scholfield's Case.* Some of these were not cases arising between banker and customer. Cases of this kind are decided in favor of the banker on the ground of the special duty owed by the customer. See *Governor, etc., of Bank of Ireland* v. *Trustees of Evans' Charities* (1885) 5 H. L. Cas. 389, 410, 3 Week. Rep. 573; *Ex parte Swan* (1860) 30 L. J. C. P. N. S. 113, 7 C. B. N. S. 400, 433; *Swan* v. *North British Australasian Co.* (1863) 2 Hurlst. & C. 175, 32 L. J. Exch. N. S. 273, 10 Jur. N. S. 102, 11 Week. Rep. 862, 5 Eng. Rul. Cas. 140; *Halifax Union* v. *Wheelwright* (1875) L. R. 10 Exch. 183, 44 L. J. Exch. N. S. 121, 32 L. T. N. S. 802, 23 Week. Rep. 704; *Mayor, etc., of Merchants of the Staple of England* v. *Bank of England* (1887) 21 Q. B. D. 160, 57 L. J. Q. B. N. S. 418, 36 Week. Rep. 880, 52 J. P. 580, 7 Eng. Rul. Cas. 334; *Johnson* v. *Crédit Lyonnais Co.* (1877) 3 C. P. D. 32, 43, 47 L. J. C. P. N. S. 241, 37 L. T. N. S. 657, 26 Week. Rep. 195; *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525, 534, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637; *London and S. W. Bank* v. *Wentworth* (1880) 5 Ex. D. 96, 49 L. J. Exch. N.

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S. 657, 42 L. T. N. S. 188, 28 Week. Rep. 516; *Marcussen* v. *Birkbeck Bank* (1889) 5 Times L. R. 179, 463, 646; Paget on Law of Banking, 148; *Union Credit Bank* v. *Mersey Docks* [1899] 2 Q. B. 205, 68 L. J. Q. B. N. S. 842, 81 L. T. N. S. 44, 4 Com. Cas. 227; Beven on Negligence, 2d ed. p. 1601.

Neville, K.C., and **Sargant**, for the respondents, contended that the increases in the cheques in suit were not signed or authorized by the respondents, but were forgeries. They did not entitle the appellants to pay the increased amount out of the joint trust account. The respondents, in signing the cheques, had no reason to suspect Myers; and, even if the case were one of negligent drawing by a customer and of subsequent alteration by a third party, such negligence is not sufficient to charge the customer by estoppel or otherwise. No contract, express or implied, was shown sufficient to cast on the respondents liability for the losses occasioned by the forgery and fraud of Myers. They were not occasioned proximately by any negligence of the respondents, and there is nothing in this case to displace the general rule that the risk of forgery is a banker's risk, and not a customer's risk. The only authority in favor of the appellant is *Young* v. *Grote* (1827) 4 Bing. 253, 5 L. J. C. P. 165, 12 J. B. Moore, 484, 29 Revised Rep. 552, and that has been seldom followed and frequently distinguished. [**563**] See *Nash* v. *De Freville* [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 48 Week. Rep. 434, 82 L. T. N. S. 642, 16 Times L. R. 268; *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124; *Young* v. *Grote, supra,* is only an authority in the case of blank cheques being drawn. It was contended on the authority of the actual decision in the case of *Scholfield* v. *Earl of Londesborough, supra,* or at any rate of the general reasoning on which that and other analogous decisions have been based, that the respondents had not violated any known and established duty which they owed to their bankers.

Cohen, K.C., replied.

The judgment of their Lordships was delivered by

Sir Arthur Wilson. The two respondents, Marshall and Day, and one Myers, were executors of Ann Myers. As such

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they opened an account with the appellant banking company in Melbourne on March 24, 1900, when they paid in a sum of 1,596*l.* 15*s.* 2*d.*; and against that account cheques were from time to time drawn signed by the three executors. On May 25, 1900, before any of such cheques were drawn, the three executors addressed a letter to the bank, by which they requested the bank to pay cheques signed by the three, and sent specimens of their signatures. The course of business followed by the three executors amongst themselves was this: Myers, who alone resided in Melbourne, drew each of the cheques, sent it for signature to Marshall, who signed first, then to Day, who signed second, and finally added his own signature.

Out of the total number of the cheques so drawn the present controversy relates to five cheques, which, as originally drawn by Myers and signed by Marshall and Day, were for 10*l.*, 2*l.* 6*s.* 4*d.*, 50*l.*, 10*l.*, and 10*l.* But each of these cheques was so written out as to leave a space between the left-hand margin and the statement of the amount of the cheque, both as given in words and as given in figures, and in that condition it was signed by Marshall and Day. Myers, by acts amounting to simple forgery, added words and figures to the left of those originally written in the cheques, so turning them apparently into cheques for 110*l.*, 32*l.* 6*s.* 4*d.*, 150*l.*, 110*l.*, and 110*l.* The cheques in their [**564**] altered forms were presented to and paid by the bank. And it has been found (and their Lordships accept the finding) that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered.

When the forgeries came to light the bank claimed to debit the executors' account with the amounts of the cheques as paid by it in their altered form; whilst the respondents contended that the debit should only be of the original amounts of the cheques. The aggregate of the differences was 450*l.*

The suit out of which the present appeal arises was then brought in the Supreme Court of Victoria by the respondents against the bank, Myers being added as a defendant as he refused to join as a plaintiff. The statement of claim, amongst other allegations, set out in outline the facts already stated, and put the plaintiffs' claim upon several alternative grounds, which

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need not be considered. The defense raised the whole question now material in ¶ 11, which said:—

"If the said cheques, or any of them, were fraudulently altered and increased in amount, such cheques were, and each of them was, drawn by the plaintiffs and the defendant Myers without reasonable care or precaution, and in a manner and form so negligent that they enabled and permitted the alterations and erasures, if any."

And it was contended that the plaintiffs were, by reason of the facts so stated, "estopped from alleging that the cheques so altered and increased in amount were not their cheques, or drawn by them, or with their authority, and from alleging that the said cheques, or any of them, were in fact fraudulently altered and increased in amount."

The case was tried before Madden, Ch.J., and a jury, and at the trial the facts proved, so far as they are now material, were those which have been stated. The learned Chief Justice, in charging the jury, left to them the question, "Were the cheques, or any of them, drawn by the plaintiffs negligently having regard to what I have told you?" And he proceeded to say: "If a customer of a bank is drawing a cheque upon that bank, it appears, according to our law (as I think it still exists), that the customer is bound to avoid such negligence in drawing out [565] his cheque as will unreasonably expose the banker to the risk of having to pay more than the proper amount of the cheque which was drawn out by such customer."

The learned Chief Justice afterwards explained his view a little more fully by saying: "If you draw a cheque in a manner which a jury thinks is so negligent that it induced or caused opportunity to a person who chances to be desirous of committing a forgery to effect that forgery, so that the banker is exposed to the paying of a larger sum than you, the customer, intended when you signed the cheque, then the law is, that if a jury is of opinion that such action of the customer amounts to negligence, and negligence of such a kind as in the opinion of the jury ought to preclude him from complaining of the fact that the banker paid the altered cheque, then the customer cannot complain against the bank."

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The jury answered the question thus left to them in the affirmative as to all the cheques in controversy, and found a verdict for the defendant bank, upon which judgment was entered for the defendant bank with costs. And the full court, on appeal, approved the ruling of the Chief Justice, and affirmed the judgment.

The now respondents appealed to the High Court of Australia. And that court reversed the decision of the Supreme Court of Victoria, and dismissed the suit, holding that the ruling of the Chief Justice was not in accordance with law, and that there was no evidence of negligence proper to be left to the jury. Against that decision of the High Court the present appeal has been brought.

In the course of the argument of the appeal before their Lordships, as well as in the courts in Australia, much was said about the case of *Young* v. *Grote* (1827) 4 Bing. 253, 5 L. J. C. P. 165, 12 J. B. Moore, 484, 29 Revised Rep. 552, a case always cited in connection with this branch of the law. That case, however, was critically examined in the House of Lords in the case of *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124, and the latter case has now become the governing authority which must prevail so far as the principles laid down in it extend.

In order to appreciate the effect of that decision, it is necessary [**566**] to notice the history of the case and the manner in which it came before the House of Lords. The suit was by a holder for value of a bill of exchange against the acceptor, in which the plaintiff sought to make the defendant liable for the full apparent amount of a bill accepted by him, and subsequently increased in apparent amount by a forger, on the ground that the bill, as accepted by the defendant, was drawn in a manner so negligent as to have facilitated the forgery subsequently committed. The case was tried before Charles, J., without a jury, and the learned judge had to deal, and dealt, with two principal propositions essential to the plaintiff's success. The first was that the law merchant imposes upon everyone who accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of its amount being

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fraudulently increased. That proposition the learned judge accepted. The second principal proposition dealt with by the learned judge was that, on the facts of that case, the acceptor of the bill had been guilty of such negligence as to bring him within the operation of the first proposition. This second proposition was rejected by the learned judge, who accordingly dismissed the suit. In order to show the connection between that case and the present, it is sufficient to say that there is no suggested ground of negligence in this case which was not present in *Scholfield* v. *Earl of Londesborough, supra.*

An appeal against the judgment of Charles, J., was brought in the Court of Appeal, and in that court two of the Lords Justices rejected both propositions, holding not only that no such duty as alleged lies upon the acceptor of a bill of exchange, but also that, assuming the existence of such a duty, it had not been violated. The third Lord Justice accepted both propositions as correct, and thought that the plaintiff in the case ought to succeed.

The appeal to the House of Lords impugned, therefore, the correctness of the two rulings of the majority of the Court of Appeal, and the argument proceeded on the same lines. So that both the propositions referred to were directly in question before the House of Lords.

[**567**] The first proposition was expressly negatived by the House of Lords, but so far the decision does not directly affect the present case, for the contractual relation existing between a banker and his customer differentiates their case from that of the acceptor and the holder of a bill, and this was pointed out by several of their Lordships. It was recognized that there is or may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. It was recognized that "if the . . . customer by any act of his has induced the banker to act upon the document by his act, or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled." [1896] A. C. at p. 523. No attempt

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was made to define the extent of such obligation; it was unnecessary to do so in that case, nor do their Lordships propose now to attempt any abstract definition of such duty. Indeed, it would be impossible to do so, seeing that the extent of the duty may depend upon an agreed or established course of dealing between the parties.

But the duty which, according to the ruling of the learned Chief Justice, subsists between customer and banker, is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, as existing between the acceptor and the holder of a bill. And, as has been pointed out, the House of Lords had before them, on the appeal, the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present case) did not amount to a breach of the obligation, supposing that obligation to exist.

Not one of the members of their Lordships' House appears to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor [1896] A. C. at p. 532, expressed his concurrence in the opinion of Lindley, L.J., "that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper [568] with it; and the wider proposition of Bovill, Ch. J., in a former case, *Société Généralé* v. *Metropolitan Bank* (1873) 27 L. T. N. S. 849, 856, 21 Week. Rep. 335, that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land." Lord Watson [1896] A. C. at p. 540, approved the same rulings. Lord Macnaghten at p. 544 expressed the same opinion, and Lord Davey concurred in the judgment of Lord Watson.

The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation. Their Lordships there-

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fore agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents. They will humbly advise His Majesty that this appeal should be dismissed.

The appellant bank will pay the respondents' costs of and incidental to the appeal as between solicitor and client.

Solicitors for appellants: *Blyth, Dutton, Hartley, & Blyth.*
Solicitor for respondents: *John Bartlett.*

Note.—Liability of bank which pays raised check.

Taking the concrete situation presented by the payment of a raised check by the bank upon which it is drawn, and seeking to determine whether the loss thereby occasioned must be borne by the bank or by the drawer of the check, it will be found that a solution of the question may involve an inquiry into various legal principles governing the reciprocal duties of banks and their depositors, for full information as to the existence and operation of which it will be necessary to go outside the raised-check cases. Instead of collecting the raised-check cases, therefore, the endeavor of this note will be to enumerate the various questions likely to arise, and to indicate the state of authority thereon. For annotation of collateral interest, see note to *Imperial Bank* v. *Bank of Hamilton,* 4 B. R. C. 588, on "Right of bank in respect to certified check or draft fraudulently altered," and note on p. 702, on "Liability of maker, acceptor, or indorser of commercial paper where blanks therein are filled up contrary to his instructions."

Inasmuch as the undertaking of a bank is to pay out the funds deposited upon the order of the depositor only, it is entitled to credit only for the amount for which the check was originally given, and in the absence of some breach of duty on the part of the depositor, or of circumstances operating as an estoppel, it must, as between itself and the drawer of a raised check, stand the loss. *Hall* v. *Fuller* (1826) 5 Barn. & C. 750, 8 Dowl. & R. 464, 4 L. J. K. B. 297, 29 Revised Rep. 383. The remedy of the bank in such case is by recourse to the person to whom the amount of the check has been paid, who in turn may have recourse to the person from whom he received the check, and so on until the original wrongdoer is reached. Thus, it has been held that where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered as having been paid without consideration; but that if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss.

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Espy v. *First Nat. Bank* (1874) 18 Wall. 604, 21 L. ed. 947. The duty of the drawee to know the handwriting of the drawer, and to be assured of its genuineness before making payment, does not extend to the body of the instrument, but is confined to the signature, and therefore does not preclude a recovery of money paid thereon. *Bank of Commerce* v. *Union Bank* (1850) 3 N. Y. 230; *White* v. *Continental Nat. Bank* (1876) 64 N. Y. 316, 21 Am. Rep. 612; *Marine Nat. Bank* v. *National City Bank* (1874) 59 N. Y. 67, 17 Am. Rep. 305. The rights of the drawee bank as against the person to whom a raised check has been paid do not, however, fall within the scope of this note, and will not be further considered.

It being settled, then, that primarily, as between the drawer and the bank, the loss must be borne by the bank, the question next arises as to whether there has been such a breach of some duty on the part of the drawer toward the bank with respect to the check as will render him liable for the resulting loss. This duty may be antecedent to the issuance of the check, or subsequent to its return as a voucher.

It has been held that the delivery of a check to a stranger, with whom the drawer sustained no business relation and was under no obligation to accommodate, in exchange for currency, as a matter of accommodation, is not such negligence as will impose upon the drawer the loss resulting from a raising of the amount of the check, the drawing of the check in favor of the stranger not being the proximate cause of the loss. *National Bank* v. *Nolting* (1897) 94 Va. 263, 26 S. E. 826, 2 Am. Neg. Rep. 264.

Upon the question involved in COLONIAL BANK v. MARSHALL, whether the fact that a check or other commercial paper is drawn with spaces which can be utilized for the purpose of fraudulent alteration is a breach of duty toward persons who may in good faith advance money thereon, so as to impose the resulting loss upon the drawer or his surety, the decisions are in conflict, as appears from a note in 21 L.R.A.(N.S.) 402, in which the subject is discussed. According to such note, the preponderance of authority, especially among the later cases, is to the effect that the leaving of such spaces cannot be considered as negligence. As so holding, see as the leading case, *Greenfield Sav. Bank* v. *Stowell* (1877) 123 Mass. 196, 25 Am. Rep. 67; also *Exchange Nat. Bank* v. *Bank of Little Rock* (1892) 22 L.R.A. 686, 7 C. C. A. 111, 19 U. S. App. 152, 58 Fed. 140; *Fordyce* v. *Kosminski* (1886) 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Knoxville Nat. Bank* v. *Clark* (1879) 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Bank of Herington* v. *Wangerin* (1902) 65 Kan. 423, 59 L.R.A. 717, 70 Pac. 330; *Burrows* v. *Klunk* (1889) 70 Md. 451, 3 L.R.A. 576, 14 Am. St. Rep. 371, 17 Atl. 378; *Wade* v. *Withington* (1861) 1 Allen, 561; *Cape Ann Nat. Bank* v. *Burns* (1880) 129 Mass. 596; *Holmes* v. *Trumper* (1871) 22 Mich. 427, 7 Am.

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Rep. 661; *Goodman* v. *Eastman* (1828) 4 N. H. 455; *Crawford* v. *West Side Bank* (1885) 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; *National Exch. Bank* v. *Lester* (1909) 194 N. Y. 461, 21 L.R.A. (N.S.) 402, 87 N. E. 779, 16 Ann. Cas. 770; *Flannagan* v. *National Bank* (1888) 18 N. Y. S. R. 826, 2 N. Y. Supp. 488; *Searles* v. *Seipp* (1895) 6 S. D. 472, 61 N. W. 804 (*obiter*); *Scholfield* v. *Londesborough* [1895] 1 Q. B. 536. The effect of the fraudulent alteration of commercial paper is, at common law, wholly to avoid it, even in the hands of a bona fide holder; though under the negotiable instruments law the maker, indorser, or surety is liable thereon to a bona fide holder according to its original tenor. See cases last above cited.

The principal exponent of the contrary view, that the leaving of such spaces in commercial paper as facilitate its fraudulent alteration is negligence, is the case of *Garrard* v. *Haddan* (1870) 67 Pa. 82, 5 Am. Rep. 412; and see also, to the same purport, *Yocum* v. *Smith* (1872) 63 Ill. 321, 14 Am. Rep. 120 (in which, however, it appeared that the maker of the note in question was informed by letter by the purchaser, very soon after the date of the note, that he had bought it, and of its date and amount, but made no objection to the amount until nearly a year later); *Merritt* v. *Boyden* (1901) 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907 (also *obiter*); *Bank of Commerce* v. *Haldeman* (1900) 109 Ky. 222, 58 S. W. 587 (where, however, the question was held not properly raised by the pleadings); *Hackett* v. *First Nat. Bank* (1902) 114 Ky. 193, 70 S. W. 664; *Isnard* v. *Torres* (1855) 10 La. Ann. 103; *Helwege* v. *Hibernia Nat. Bank* (1876) 28 La. Ann. 520; *Trigg* v. *Taylor* (1858) 27 Mo. 245, 72 Am. Dec. 263 (*obiter*); *Scotland County Nat. Bank* v. *O'Connel* (1886) 23 Mo. App. 165; *Howie* v. *Lewis* (1900) 14 Pa. Super. Ct. 232 (*obiter*), affirmed in 196 Pa. 558, 46 Atl. 850; *Leas* v. *Walls* (1882) 101 Pa. 57, 47 Am. Rep. 699 (word "eight" changed to "eighty;" maker's negligence held a question for the jury). *Dorwin* v. *Thomson* (1869) 13 Lower Can. Jur. 262. The English case of *Young* v. *Grote* (1827) 4 Bing. 253, 12 J. B. Moore, 484, 5 L. J. C. P. 165, 29 Revised Rep. 552, is sometimes cited as supporting this doctrine. It was there held that the loss should fall upon the depositor rather than upon the banker, where the former's wife, to whom he had intrusted checks signed in blank, with authority to fill the blanks, in filling out a check left spaces so that her husband's clerk, to whom she delivered the check to get it cashed was enabled to increase the amount without exciting suspicion. While, as appears from the cases which comment upon it, there seems to be some uncertainty as to the ground upon which the decision is based, it may be reconciled with the weight of authority by treating it as holding that, under the circumstances involved, the drawer of the check was

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estopped from asserting that the amount inserted was in excess of the authority of the person to whom the check was intrusted.

The question whether the drawer of a check which, after it has been signed, is raised by an employee, is estopped by the fact that the employee was known by the bank to have authority to prepare checks for signature and present them for payment, so that any change in the amount of a check appearing in his handwriting would excite no suspicion, to contest such employee's authority to increase the amount, is treated in a note in 41 L.R.A.(N.S.) 529, from which it appears that the creation of an estoppel by such circumstances is affirmed in *Champion Ice Mfg. & Cold Storage Co.* v. *American Bonding & T. Co.* (1903) 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; and *Otis Elevator Co.* v. *First Nat. Bank* (1912) 163 Cal. 31, 41 L.R.A.(N.S.) 529, 124 Pac. 704; and is hinted at in the opinion of Gaselee, J., in *Young* v. *Grote, supra,* and *Dana* v. *National Bank* (1882) 132 Mass. 156. The annotator states that for the most part the cases dealing with such a situation treat the fact that the person who committed the fraud was an employee as a mere circumstance bearing on the question of negligence, rather than as an independent ground of decision, and refers in this connection to the cases of *Young* v. *Grote, supra; Halifax Union* v. *Wheelwright* (1875) L. R. 10 Exch. 183, 44 L. J. Exch. N. S. 121, 32 L. T. N. S. 802, 23 Week. Rep. 704; *Timbel* v. *Garfield Nat. Bank* (1907) 121 App. Div. 870, 106 N. Y. Supp. 497; *Trust Co. of America* v. *Conklin* (1909) 65 Misc. 1, 119 N. Y. Supp. 367 (in which the loss was thrown upon the depositor); and *Critten* v. *Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Exchange Nat. Bank* v. *Bank of Little Rock* (1893) 22 L.R.A. 686, 7 C. C. A. 111, 19 U. S. App. 152, 58 Fed. 140 (where the loss was thrown upon the bank).

But, as above stated, there may be a breach of duty toward the bank in failing to detect and give notice of the fact that a check has been raised, as well as in dealing therewith prior to its issuance. Although there has been some difference of opinion on the point, the great weight of judicial opinion affirms the existence of a duty owing to the bank on the part of a depositor to make some examination of his account as shown by the pass book and vouchers upon their return from the bank, to detect forgeries, alterations, or fraudulent charges. See note on the question appended to *Morgan* v. *United States Mortg. & Trust Co.* (1913) L.R.A.1915D, 741, citing to this effect *National Dredging Co.* v. *Farmers' Bank* (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Israel* v. *State Nat. Bank* (1909) 124 La. 885, 50 So. 783; *McKeen* v. *Boatmen's Bank* (1898) 74 Mo. App. 281; *Brown* v. *Lynchburg Nat. Bank* (1909) 109 Va. 530, 64 S. E. 950, 17 Ann.

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Cas. 119; *Leather Mfrs. Nat. Bank* v. *Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *National Bank* v. *Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1; *Scanlon-Gipson Lumber Co.* v. *Germania Bank* (1903) 90 Minn. 478, 97 N. W. 380; *Critten* v. *Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Cincinnati Nat. Bank* v. *Creasy* (1887) 10 Ohio Dec. Reprint, 121 (where, however, the duty is confined to the discovery of alterations, and held not to extend to forgeries of the depositor's signature). *Contra, Weisser* v. *Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731 (in which, however, the statement on this point appears to be *obiter,* and is so treated in *Critten* v. *Chemical Nat. Bank, supra*); *Manufacturers' Nat. Bank* v. *Barnes* (1872) 65 Ill. 69, 16 Am. Rep. 576, and *Merchants' Nat. Bank* v. *Nichols & S. Co.* (1906) 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38 (in which *Weisser* v. *Denison, supra,* is cited with approval, though the cases finally turned on the fact that the bank had been negligent in paying the checks); and see also in this connection remarks made in *Walker* v. *Manchester & L. Dist. Bkg. Co.* (1913) 108 L. T. N. S. 728, 29 Times L. R. 492, 57 Sol. Jo. 478, and *Bank of England* v. *Vagliano Bros.* [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695. The doctrine of *Weisser* v. *Denison, supra,* though nominally approved in *Frank* v. *Chemical Nat. Bank* (1881) 84 N. Y. 209, 38 Am. Rep. 501, is really modified thereby, all that was decided therein being that a depositor is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud.

The examination must be made within a reasonable time (*Janin* v. *London & S. F. Bank* (1891) 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100), and with such reasonable care and diligence as is required by the circumstances of the particular case, including the relation of the parties and the established or known usages of the banking business. See *Leather Mfrs. Nat. Bank* v. *Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Hardy* v. *Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325; *Critten* v. *Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969. As to what has been held to constitute, or not to constitute, reasonable care, see, in addition to the cases last above cited, *Morgan* v. *United States Mortg. & T. Co.* (1913) 208 N. Y. 218, L.R.A.1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462; *Brown* v. *Lynchburg Nat. Bank* (1909) 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119; *Cole* v. *Charles City Nat. Bank* (1901) 114 Iowa, 632, 87 N. W. 671; *Shipman* v. *Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Clark* v. *National Shoe & Leather Bank* (1900) 164 N. Y. 498, 58 N. E. 659; *First Nat. Bank* v. *Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St.

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Rep. 80, 14 So. 335; *Israel* v. *State Nat. Bank* (1909) 124 La. 885, 50 So. 783; *Scanlon-Gipson Lumber Co.* v. *Germania Bank* (1903) 90 Minn. 478, 97 N. W. 380; *Frank* v. *Chemical Nat. Bank* (1881) 84 N. Y. 209, 38 Am. Rep. 501; *National Bank* v. *Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1, which are reviewed at length in the note in L.R.A.1915D, pp. 743–745. The examination may be delegated to an agent (*Shipman* v. *Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Leather Mfrs. Nat. Bank* v. *Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *National Bank* v. *Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1) provided ordinary care is used in selecting such agent (*Kenneth Invest. Co.* v. *National Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002; *National Bank* v. *Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1). The effect of intrusting the examination of vouchers to the employee guilty of the original fraud upon the depositor's right to hold the bank responsible for the amount of forged or raised checks is considered in a note in 7 L.R.A.(N.S.) 744, where, after observing that a depositor is not in the first instance, and apart from any subsequent fraud or breach of duty on the part of the employee, chargeable with the latter's knowledge of his own fraud in forging or raising checks (*Shipman* v. *Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371) and pointing out that the cases which deny the existence of any duty toward the bank on the part of the depositor to verify the account and examine the returned vouchers (such as *Weisser* v. *Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731; *Welsh* v. *German American Bank* (1878) 73 N. Y. 425, 29 Am. Rep. 175; and *Manufacturers' Nat. Bank* v. *Barnes* (1872) 65 Ill. 69, 16 Am. Rep. 576) are of but little value upon the point under discussion, the annotator states that, assuming that the depositor owes a duty of examination, there are a number of different views, having more or less support from the cases, affecting the ultimate question whether the depositor is estopped, as against the bank, by intrusting that duty to the dishonest employee. These views he formulates as follows:

"That, while the depositor is not, in the first instance, chargeable with the dishonest employee's knowledge of his own fraud in raising or forging the check, yet, by intrusting the verification of the account and the examination of the vouchers to that employee, he becomes chargeable with the latter's antecedent knowledge. It is apparent that, in this view, assuming the existence of the other conditions essential to an estoppel, *e. g.*, prejudice to the bank and freedom from negligence on its part, the estoppel of the depositor and his inability to recover against the bank follow—inevitably and irrespective of any negligence on his own part, or any question as to whether the examination, if made by an honest and competent person with due care,

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would have disclosed the fraud—from the fact of intrusting to the dishonest employee the duty of verification and examination which he owed to the bank." This view, he says, finds support in statements to be found in *First Nat. Bank* v. *Richmond Electric Co.* (1907) 106 Va. 347, 7 L.R.A.(N.S.) 744, 117 Am. St. Rep. 1014, 56 S. E. 152; and *First Nat. Bank* v. *Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; but is repudiated in *Kenneth Invest. Co.* v. *National Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002.

The second view is "that the effect of intrusting the verification of the account and the examination of the vouchers to the dishonest employee is the same as if no verification or examination had been made at all. This view works out practically the same results as the first; in other words, the estoppel of the depositor and his inability to recover from the bank necessarily follow from intrusting the duty of verification and examination to the dishonest employee, assuming, as before, the existence of the other conditions essential to an estoppel." This view is supported by *August* v. *Fourth Nat. Bank* (1888) 15 N. Y. S. R. 956, 1 N. Y. Supp. 139; and was presented by counsel for the bank in *Kenneth Invest. Co.* v. *National Bank, supra,* in the form of a request to charge, which was denied.

The third view is "that the duty resting upon the depositor to verify the account and examine the vouchers is not a personal one, but may be delegated to a competent employee; and that the fraud, negligence, or omission of such employee is not imputable to the depositor. In this view, the depositor is exonerated if he had good reason to believe, and did believe, that the employee in question was honest and competent. This view, if it could be maintained without qualification, would be the most favorable to depositor, since it would protect him even if an examination by an honest and competent person would have disclosed the fraud." This view is said to be sustained by *Kenneth Invest. Co.* v. *National Bank, supra; Wachsman* v. *Columbia Bank* (1894) 8 Misc. 280, 28 N. Y. Supp. 711; and to receive some support from *Frank* v. *Chemical Nat. Bank* (1881) 84 N. Y. 209, 38 Am. Rep. 501, and *Clark* v. *National Shoe & Leather Bank* (1898) 32 App. Div. 316, 52 N. Y. Supp. 1064, affirmed in 164 N. Y. 498, 58 N. E. 659.

The fourth view is "that the depositor who intrusts the verification of the account and the examination of the vouchers to the fraudulent employee, if in no worse, is at least in no better, position than if such duty had been intrusted to an honest and competent employee. This view assumes that the negligence or omission of such an employee would be imputable to the depositor; in other words, that the duty which the depositor owes to the bank cannot be delegated to an employee so as to absolve the former from responsibility for the latter's negligence. In this view, it is apparent that the rights of the parties

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are made to turn upon the question whether an honest and competent employee, not having previous knowledge of the forgeries or other fraud, would, by the exercise of reasonable care, have discovered the same by his examination of the vouchers. This presents a question of fact, or a mixed question of law and fact, which in general is for the jury, or the court sitting as the jury, but which may, of course, under some circumstances, be disposed of by the court as a matter of law, upon the ground that the evidence upon the point is uncontradicted, and is fairly susceptible of but one conclusion." This view, for which the author of the note in question expresses a preference, is sustained by *Critten* v. *Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969, which is followed in *National Dredging Co.* v. *Farmers' Bank* (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607, and by *Dana* v. *National Bank* (1882) 132 Mass. 156; and *Myers* v. *Southwestern Nat. Bank* (1899) 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280.

"The fifth view varies but slightly from the fourth, and in practical cases it is with difficulty to be distinguished therefrom. It, however, makes the rights of the respective parties turn, as in the fourth view, upon the question whether an examination of the vouchers, by an honest and competent employee, would have disclosed the fraud, but upon the question whether a reasonable supervision by the depositor over the fraudulent employee in the discharge of the duty of examining the vouchers would have disclosed the forgeries. It is perhaps, for practical purposes, an over-refinement to attempt to distinguish between the fourth and fifth views. It is apparent, however, that, under conceivable circumstances, there might be a practical as well as a theoretical difference between them, since forgeries which might be apparent upon an examination of the vouchers by an honest and competent employee might not be apparent upon a reasonable supervision by the depositor of the conduct of the fraudulent employee in the examination of such vouchers." This view is sustained by *Leather Mfrs. Nat. Bank* v. *Morgan* (1885) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, and *Hardy* v. *Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325.

Even if there has been a breach of duty on the part of the depositor with respect to the examination of the returned vouchers, or even if he is chargeable with knowledge of the forgery or alteration, the bank may still remain liable, as will presently appear, if it has been negligent in paying the forged or altered checks, or if it has not been prejudiced by the delay in discovering the fraud.

It is sometimes held that silence on the part of a depositor who has received from the bank a pass book and canceled checks showing the state of his account amounts to an admission of the correctness of the entries of debits and credits in the pass book. In such a case

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the account is presumed to be correct until shown otherwise. (See *Benton County Bank* v. *Walker* (1892) 85 Iowa, 728, 51 N. W. 241; *Schoonover* v. *Osborne Bros.* (1899) 108 Iowa, 453, 79 N. W. 263; *Des Moines Nat. Bank* v. *Sisson* (1909) 143 Iowa, 191, 121 N. W. 533; *Weisser* v. *Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731; *Harley* v. *Eleventh Ward Bank* (1879) 76 N. Y. 618; *August* v. *Fourth Nat. Bank* (1888) 15 N. Y. S. R. 956, 1 N. Y. Supp. 139; *Nodine* v. *First Nat. Bank* (1902) 41 Or. 386, 68 Pac. 1109; *McLaughlin* v. *First Nat. Bank* (1897) 71 Ill. App. 329; *Clark* v. *Mechanics' Nat. Bank* (1882) 11 Daly, 239.) Failure to examine the pass book in such cases merely places on the depositor the burden of showing that the balance as returned is not correct; it does not estop him to show error in the account. (See *Rettig* v. *Southern Illinois Nat. Bank* (1909) 147 Ill. App. 193; *Farry* v. *Farmers' & M. Bank* (1904) — N. J. Eq. —, 58 Atl. 305; *Shipman* v. *Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Hutchinson* v. *Market Bank* (1867) 48 Barb. 302.) The retention of the pass book without objection does not constitute a settled account. (See *Kepitigalla Rubber Estates* v. *National Bank* [1909] 2 K. B. 1010, 78 L. J. K. B. N. S. 964, 100 L. T. N. S. 516, 25 Times L. R. 402, 53 Sol. Jo. 377, 14 Com. Cas. 116, 16 Manson, 234; *Walker* v. *Manchester & L. Dist. Bkg. Co.* (1913) 108 L. T. N. S. 728, 29 Times L. R. 492, 57 Sol. Jo. 478; *Bank of England* v. *Vagliano Bros.* [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695.)

The failure of a depositor to examine his returned checks will not, therefore, necessarily throw upon him the loss due to forgeries or alterations, either upon the theory of an account stated, or (according to the weight of authority) upon the theory of estoppel, unless the bank has suffered loss or prejudice by reason of failure to give prompt notice thereof. So, if the bank has suffered no damage from the depositor's dereliction of duty, it cannot require him to bear the loss. (See *Janin* v. *London & S. F. Bank* (1891) 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Wind* v. *Fifth Nat. Bank* (1890) 39 Mo. App. 72; *McKeen* v. *Boatmen's Bank* (1898) 74 Mo. App. 281; *Lieber* v. *Fourth Nat. Bank* (1909) 137 Mo. App. 158, 117 S. W. 672; *Weinstein* v. *National Bank* (1887) 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171.) But where the bank has been prejudiced by a negligent failure to give prompt notice, the depositor must bear the loss (see *Janin* v. *London & S. F. Bank* (1891) 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Weinstein* v. *National Bank* (1887) 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; *Fifth Nat. Bank* v. *Iron City Nat. Bank* (1899) 92 Tex. 436, 49 S. W. 368, s. c. on subsequent appeal 31 Tex. Civ. App. 308, 71 S. W. 612), or so much thereof as is attributable to his default

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(see *First Nat. Bank* v. *Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *National Dredging Co.* v. *Farmers' Bank* (1908) 6 Penn. [Del.] 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Critten* v. *Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969). The burden is upon the bank to show that it has been injured by the breach of duty on the part of the depositor; consequently where it has not shown such injury, it will be presumed that it suffered none. *Wind* v. *Fifth Nat. Bank* (1890) 39 Mo. App. 72; *McKeen* v. *Boatmen's Bank* (1898) 74 Mo. App. 281; *Janin* v. *London & S. F. Bank, supra.* This burden has been placed upon the bank to show injury even in case of a series of forgeries. See *Hardy* v. *Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325; *Kenneth Invest. Co.* v. *National Bank* (1902) 96 Mo. App. 125, 70 S. W. 173. But in *Leather Mfrs. Nat. Bank* v. *Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, it is stated that if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property or other form of proceedings, to compel restitution; that it is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal; that in inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgery might be proper in an action to recover damages for a violation of the depositor's duty, but in a suit by the depositor in effect to falsify its stated account to the injury of the bank, whose defense is that the depositor has by his conduct ratified or adopted the payment of the altered checks and thereby induced it to forbear taking steps for its protection against the person committing the forgeries, the right to seek and compel restoration and payment from the person committing the forgeries is in itself a valuable one, and it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it. So, also, in *McNeely Co.* v. *Bank of North America* (1908) 221 Pa. 588, 20 L.R.A.(N.S.) 79, 70 Atl. 891, it is held that the inability of a bank to show that it could have protected itself had it received prompt notice of the forgery will not prevent the failure to give such notice from depriving the depositor of his right to require the bank to make good to his account the amount of payments so made.

The rule that the bank must, in order to throw the loss upon a depositor, show that it has been prejudiced by the delay, also applies where the delay is not in discovering, but in reporting, the alteration or forgery. See note in 20 L.R.A.(N.S.) 79, reviewing

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Janin v. *London & S. F. Bank* (1891) 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Brixen* v. *Deseret Nat. Bank* (1888) 5 Utah, 504, 18 Pac. 43; *Third Nat. Bank* v. *Merchants' Nat. Bank* (1894) 76 Hun, 475, 27 N. Y. Supp. 1070; *Harlem Co-op. Bldg. & L. Asso.* v. *Mercantile Trust Co.* (1895) 10 Misc. 680, 31 N. Y. Supp. 790; *Wind* v. *Fifth Nat. Bank* (1890) 39 Mo. App. 72; *Hardy* v. *Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325; *Murphy* v. *Metropolitan Nat. Bank* (1906) 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; *Weinstein* v. *National Bank* (1887) 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; *United States* v. *National Bank* (1883) 2 Mackey, 289.

So, also, the negligent delay of the drawee in discovering the forgery of a check, prompt notice having been given as soon as the forgery was discovered, was held in *First Nat. Bank* v. *First Nat. Bank* (1890) 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44, not to preclude it from throwing the loss upon another bank which had negligently cashed the check and received credit therefor from the drawee, it having been found as a fact that the latter's negligence did not prejudice the bank.

Where there is a series of checks forged and paid at different times, some before the depositor is chargeable with notice, and some thereafter, the bank is entitled to invoke the doctrine of estoppel as to those paid after the depositor is chargeable with notice, if the failure of the depositor to call attention to the forgeries misleads the bank into paying the subsequent checks (see *Hardy* v. *Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325; *Kenneth Invest. Co.* v. *National Bank* (1902) 96 Mo. App. 125, 70 S. W. 173; *Critten* v. *Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969), or if, as some of the cases put it, the subsequent forgeries would not have been carried out (see *First Nat. Bank* v. *Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *National Dredging Co.* v. *Farmers' Bank* (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Israel* v. *State Nat. Bank* (1909) 124 La. 885, 50 So. 783).

Notwithstanding the depositor may himself have been wanting in his duty to discover or report forgeries or alterations, if the bank itself in cashing the check failed to use due care to ascertain its genuineness, it cannot shift the loss to the depositor. See *National Dredging Co.* v. *Farmers' Bank* (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Manufacturers' Nat. Bank* v. *Barnes* (1872) 65 Ill. 69, 16 Am. Rep. 576; *Merchants' Nat. Bank* v. *Nichols & S. Co.* (1906) 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38; *New York Produce Exch. Bank* v. *Houston* (1909) 95 C. C. A. 251, 169 Fed. 785. E. S. O.

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[ENGLISH COURT OF APPEAL.]

CONTINENTAL TYRE & RUBBER COMPANY (GREAT BRITAIN), LIMITED *v.* DAIMLER COMPANY, LIMITED.

THE SAME *v.* THOMAS TILLING, LIMITED.

[1915] 1 K. B. 893.
Also Reported in [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. Jo. 232.

Alien enemy — Limited liability company registered in England — Share capital held by alien enemies — Right to sue.

The plaintiff company was incorporated in England and carried on business at their registered offices in London. It had a capital of 25,000*l.* in 1*l.* shares. It was formed as a subsidiary company by a German company to promote the sale in the United Kingdom of tyres made in Germany by the German company. All its directors were German subjects resident in Germany, and the whole of its shares (except one) were held by German subjects residing in Germany:—

Held, by Lord Reading, Ch. J., Lord Cozens-Hardy, M.R., Kennedy, L.J., Phillimore, L.J., and Pickford, L.J. (Buckley, L.J., dissenting), that the company did not change its character of an English company because of the outbreak of war all the shareholders and directors resided in an alien enemy country and became alien enemies; that once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be aliens; that payment of a debt to the plaintiff company was not a payment to the alien enemy shareholders or for their benefit, and that the right of the plaintiff company to recover in an action brought to recover a debt due to them was therefore not affected by the fact that practically the whole of the shares were held by alien enemies.

(January 15, 1915.)

CONTINENTAL TYRE AND RUBBER COMPANY (GREAT BRITAIN), LIMITED *v.* DAIMLER COMPANY, LIMITED.

APPEAL of the defendants from an order of Scrutton, J., at chambers affirming an order of a master by which leave was given to the plaintiffs to sign final judgment under order xiv.

The plaintiffs were a limited liability company incorporated under the companies acts. They carried on business in London

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at the registered offices of the company, and had a number of agencies throughout the United Kingdom. The company was formed in 1905 with a capital of 10,000*l.*, increased in 1908 to 25,000*l.*, to trade in motor-car tyres made in Germany by a company incorporated in that country under German law. The [894] German company formed a number of subsidiary companies in various parts of the world for the sale of these tyres. The plaintiff company was formed for the purpose of selling such tyres in the United Kingdom. At the date of the writ the German company held 23,398 shares in the plaintiff company, and the remaining shares (except one) were held by subjects of the German Empire residing in Germany. The one share was registered in the name of the secretary of the company, who was born in Germany, resided in London, and, in 1910, became a naturalized subject of the Crown. The directors were subjects of the German Empire and were resident in Germany. The business was managed by two managers and a secretary, all of whom were resident in this country.

The plaintiff company was the drawer and holder of bills accepted by the defendants for goods supplied before the declaration of war. The bills matured for payment and were presented after the declaration of war. It was admitted by the defendants that the goods had been delivered and that payment for them was due, but they resisted payment on the ground that the plaintiff company was not entitled to receive, and could not enforce, payment of the debt; they contended that the plaintiff company must be regarded as an alien enemy, and that, as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff company must be illegal.

Upon a summons taken out by the plaintiffs under order xiv. for leave to sign final judgment, a master gave leave, and his order was affirmed by Scrutton, J.

The defendants appealed.

Gore-Browne, K.C. (**H. Maddocks** with him), for the defendants. There is no authority as to the position of alien enemy shareholders in a British company on the outbreak of war.

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It is admitted that aliens may form a company in this country under the companies acts: *In re General Company for the Promotion of Land Credit* (1870) L. R. 5 Ch. 363, 39 L. J. Ch. N. S. 737, 22 L. T. N. S. 454, 18 Week. Rep. 505, and in the House of Lords sub nom. *Princess of Reuss* v. *Bos.* (1871) L. R. 5 H. L. 176, 40 L. J. Ch. N. S. 655, 24 L. T. N. S. 641. "The legal entity created by [**895**] registration is a corporate body distinct from the persons composing it" Buckley on Companies, 9th ed., p. 27 (note to § 16 of the companies [consolidation] act, 1908). The company, when incorporated, is a person independent of its shareholders: *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, at p. 497, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268. The plaintiff company is therefore a valid company. The main proposition contended for is that, though the company is a good British company, under the doctrine of nonintercourse between nationals and alien enemies the court will look at the substance and disregard the form, and if it finds that in substance, though not in form, the dealing is with an alien enemy, the court will say that payment on account of that dealing is prohibited during war. A further point is that, inasmuch as all the directors and all the shareholders, except one, are alien enemies, there is no one who can instruct a solicitor to bring an action. The directors upon the outbreak of war ceased to be directors, and as the shareholders are alien enemies they cannot exercise their functions as corporators during the war, and cannot therefore appoint new directors during the war to instruct a solicitor. The rights of the shareholders are suspended during the war.

With regard to the main point, it is stated in Lindley on Companies, 6th ed. p. 53, that "alien enemies stand in a very different position from alien friends. . . . The effect of a person who is a member of a company becoming an alien enemy by a declaration of war has never been decided; but *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 9 Revised Rep. 142, tends to show that such a person would not *ipso facto* cease to be a member, but rather that his rights and liabilities would be suspended during the war and might be enforced on restoration of peace."

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And at p. 54 it is said that a registered company does not necessarily dwell where its registered office is situate. In Westlake's International Law, part II., "War," at pp. 49, 50, when dealing with the doctrine of nonintercourse during war, it is said that shares and debentures of companies incorporated under British law which are held by enemy subjects at the outbreak of war will not cease to exist, but the dividends and interest will not be paid during the war; [**896**] and the prohibition of commercial intercourse will prevent the shareholders from exercising voting powers, and the enemy directors must be regarded as deprived of that character from the outbreak of war. In Cobbett's Leading Cases on International Law, part II., "War," at p. 89, it is said that "a corproation is itself a juristic person, and as such takes its character in war, as friendly or hostile, in general from its domicil, irrespective of the nationality of its directors or shareholders," and that on war breaking out enemy directors would *ipso facto* vacate their seats, and enemy shareholders would retain their shares as property, the right to receive dividends being suspended during the war. That is the position of the shareholders and directors. During war the business of a company in the position of the plaintiffs cannot be carried on. Notices of meetings cannot be served in Germany. Intercourse by letter in a business matter is prohibited. The doctrine of nonintercourse does not depend upon whether the transaction will enrich the enemy. There must be no commercial dealings with the enemy, nor any communication with him on a business matter which is in the nature of trading with the enemy. There must be no commercial intercourse. Westlake's International Law, part II., p. 48, note 2. There must be no communication on a matter of business; no inviting of the enemy to take part in trade here by acting as shareholders in the company. It would be most dangerous that enemy shareholders in an armament company should be allowed to influence its management. The question of commercial intercourse must be determined either under the common law or under the trading with the enemy act 1914 (4 & 5 Geo. V., chap. 87). Section 3 of the act contemplates that the constitution of a British company may be such that it could not carry on its business in this country

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by its directors and shareholders, but that it is in the public interest that the business should continue to be carried on, and in such a case it gives the Board of Trade power to appoint a comptroller to carry on the business. That has not been done here, but an inspector has been appointed under § 2, subsec. 2 (b). The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914, recites that it is "contrary to law for any person resident, carrying on business, or being in our [**897**] dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without our permission." The offense of trading with the enemy is not got rid of by appointing an agent for an alien enemy. Where practically all the shareholders are alien enemies, trading with the company is trading with the enemy. The court ought for this purpose to go behind the constitution of the company. It does not follow that an English company with alien enemy shareholders cannot trade here; § 2, subsec. 2 (b), of the trading with the enemy act 1914, shows that it can. But it cannot do so where substantially all its shareholders are alien enemies. Paragraphs 3 and 5 of the Proclamation apply. The court will look behind the form of the transaction, and will have regard to its substance and to the facts of the case. At common law there must be no trading with the enemy, whether it is done directly or through the technical entity of a company all, or practically all, of whose shareholders are alien enemies. The alien enemy shareholders are clothed in the dress of an incorporated company, but the enemy shareholders are the real *persona* carrying on the business. A dealing with such a company is in substance a dealing with alien enemies, the enemy directors managing the business for the alien enemy shareholders. Suppose that an alien enemy carried on business here through a British trustee, a trading with the trustee would be a trading with the enemy. The appointment of an inspector under § 2, subsec. 2, of the trading with the enemy act 1914, does not give a license to an alien enemy to trade under paragraph 8 of the Proclamation. The act has not made that lawful which was unlawful at common law. That subsection applies to persons who are not, as well as

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to persons who are, alien enemies. The plaintiff company, being in substance an alien enemy, cannot sue. If the company can recover the debt, it will inure for the benefit of the alien enemy shareholders, who can raise money on it. Section 2, subsec. 2 (b), of the act, assumes that the company is a lawful entity, but it does not say that it shall have a license to trade. The company is suing on behalf of its shareholders who are alien enemies, and that is forbidden. This is a question of [898] public policy, and different considerations arise from those under discussion in *Salomon* v. *Salomon & Co.* [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89.

Next, the office of director became *ipso facto* vacated on the outbreak of war. There were no persons who could act for the company, and the company could only act in general meeting. That is impossible, because all the shareholders are alien enemies, and the company cannot hold a general meeting outside the jurisdiction. To allow a meeting to be held here, even if the necessary notices could be served on the enemy shareholders resident in Germany, would be to allow commercial intercourse with the enemy. Where, as here under article 102 of the articles of association of the company, the directors are intrusted with the management of the business of the company, the company cannot manage the business. *Automatic Self-cleansing Filter Syndicate Co.* v. *Cuninghame* [1906] 2 Ch. 34, 75 L. J. Ch. N. S. 437, 94 L. T. N. S. 651, 22 Times L. R. 378, 13 Manson, 156; *Quin & Axtens* v. *Salmon* [1909] 1 Ch. 311, 78 L. J. Ch. N. S. 367, 100 L. T. N. S. 161, 25 Times L. R. 164, 53 Sol. Jo. 150, 16 Manson, 127; [1909] A. C. 442, 78 L. J. Ch. N. S. 506, 100 L. T. N. S. 820, 25 Times L. R. 590, 53 Sol. Jo. 575, 16 Manson, 230; *Gramophone and Typewriter* v. *Stanley* [1908] 2 K. B. 89, at p. 105, 77 L. J. K. B. N. S. 834, 99 L. T. N. S. 39, 24 Times L. R. 480, 15 Manson, 251. By clause 17 of article 102 the management of the company includes the bringing of actions. War dissolves all contracts which involve trading with the enemy. *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, at p. 509, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268. Trade and dealing

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with the enemy are forbidden, and contracts which cannot be performed without dealing with the enemy are dissolved. *Esposito* v. *Bowden* (1857) 7 El. & Bl. 763, at pp. 781, 793, 794, 27 L. J. Q. B. N. S. 17, 3 Jur. N. S. 1209, 5 Week. Rep. 732, 24 Eng. Rul. Cas. 399. The contract of the directors is to serve and have control of the company; war has supervened and avoided that contract. It is not like a contract which has been executed and for which payment alone remains to be made. In the latter case the contract is suspended during war. The directors alone can bring an action for the company, and new directors cannot be appointed because the shareholders are alien enemies. The plaintiff company is therefore not entitled to maintain this action.

CONTINENTAL TYRE & RUBBER COMPANY (GREAT BRITAIN), LIMITED *v.* THOMAS TILLING, LIMITED.

Appeal of the defendants from a judgment in favor of the plaintiffs at the trial of the action before Lush, J.

[899] The plaintiffs' claim was for the balance of an account for goods supplied before the war. It was admitted that the goods (except as to a small amount) had been delivered and that payment for them was due; but payment was resisted on the same grounds as in the action against the Daimler Company. Judgment was given at the trial by Lush, J., for the plaintiffs. The defendants appealed.

Leslie Scott, K.C., and **H. Maddocks**, for the defendants. In the first place, the plaintiff company must on the facts be regarded as an alien enemy. Alternatively, if the company is not an alien enemy, payment to the company would be for the benefit of alien enemies, and would therefore be illegal both at common law and by reason of the Trading with the Enemy Proclamation, No. 2. Thirdly, the plaintiff company had no power to initiate this action. Dealing first with the third proposition, it is based upon three grounds. The contract between the company and the directors was dissolved on the outbreak of war, and thereupon the directors ceased to be directors; the shareholders' contracts of membership in the company were suspended during the war; consequently, where all the directors and sub-

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stantially all the shareholders of the company are alien enemies, the plaintiff company as a personality is paralyzed by the outbreak of war, so that it cannot do anything during the war. The company is struck with inactivity. *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 9 Revised Rep. 142, shows that war does not operate to confiscate an enemy's private property. All trading negotiation, communication, or intercourse with the enemy ceases. *Griswold* v. *Waddington* (1819) 16 Johns. 438. [He also referred to *Esposito* v. *Bowden* (1857) 7 El. & Bl. 763, at p. 782, 27 L. J. Q. B. N. S. 17, 3 Jur. N. S. 1209, 5 Week. Rep. 732, 24 Eng. Rul. Cas. 399; *Clemontson* v. *Blessig* (1855) 11 Exch. 135, note at p. 141.]

With regard to the main proposition, the distinction between this case and *Salomon* v. *Salomon & Co.* [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89, is this,—the common law administered during war regards the natural person, the person who acts, and not the technical person. Upon war breaking out every subject of the King is at war with every enemy subject, except when the enemy subjects throw in their [900] lot with this country by residing here and *vice versa*. A corporation is not an enemy or a subject; individuals are. The object of forbidding intercourse with the enemy is to hurt the enemy and to bring economic pressure upon him. Following that out, it is impossible to pay money to this company without benefiting an alien enemy. In the present case no question arises as to what would happen where a proportion of the shareholders were British subjects; here they are substantially all alien enemies. The law relating to intercourse with an enemy is a branch of the law relating to public policy. [He also cited *Potts* v. *Bell* (1800) 8 T. R. 548, 2 Esp. 612, 5 Revised Rep. 452, 2 Eng. Rul. Cas. 654; *The Emulous* (1813) 1 Gall. 563, Fed. Cas. No. 4,479; *The Tommi* [1914] P. 251, 31 Times L. R. 15, 59 Sol. Jo. 26; *The Rapid* (1812) 1 Gall. 295, Fed. Cas. No. 11,576, 8 Cranch, 155, 3 L. ed. 520; *The Julia* (1813) 1 Gall. 594, 603, Fed. Cas. No. 7,575; *Society for Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, Fed. Cas. No. 13,156; *Bank of United States* v. *Deveaux* (1809) 5 Cranch, 61, at pp. 84, 86, 3 L. ed. 38, 44.]

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J. H. M. Campbell, K.C., and **Douglas Hogg**, for the plaintiffs. The real question in these cases is whether the plaintiff company is a British company. It is submitted that it is a British company for all intents and purposes in peace and war. The defendants admit that it is a British company in time of peace, but say that in time of war they are not to be barred by technicality from showing its German constitution; that proposition is devoid of authority. The status of the plaintiff company remains unaffected by a state of war. In no recognized authority on international law is there any suggestion to the effect of the defendants' contention. A company is an entity entirely apart from the quality or nationality of its shareholders. Buckley on Companies, 9th ed., p. 4. The case of *Gramophone and Typewriter Co.* v. *Stanley* [1908] 2 K. B. 89, 77 L. J. K. B. N. S. 834, 99 L. T. N. S. 39, 24 Times L. R. 480, 15 Manson, 251, is conclusive to show that even though the whole capital is absorbed by one individual, or by one set of shareholders, the question is whether its place of business and its offices are in this country. *Amorduct Co.* v. *Defries* (1914) 31 Times L. R. 69, 59 Sol. Jo. 91, is an authority that the position of such a company is not altered in time of war. The cases of *Daniel* v. *Commissioners* [901] *for Claims on France* (1825) 2 Knapp, P. C. C. 23, and *Long* v. *Commissioners for Claims on France* (1825) 2 Knapp, P. C. C. 51, are indistinguishable from the present case, of which they are the converse. The former was a case in which the Irish owners of a religious institution in France applied to the commissioners for compensation for injury to their premises; their claim was rejected by the Board of Claims and came before the Privy Council. The point was the character of the establishment, and the decision shows that regard is not paid to the individual members of a company more in time of war than in peace. [He also referred to *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.]

Phillimore in his treatise on International Law, vol. 3, when discussing the case of *Society for Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, Fed. Cas. No. 13,156, entirely

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disputes the proposition that at the outbreak of war subjects are bound to return to their own countries. As to an implied authority in the plaintiff company to carry on this trade, the evidence of license by implication is overwhelming.

Gore-Browne, K.C., in reply.

The following judgment of the majority of the court (Lord Reading, Ch. J., Lord Cozens-Hardy, M.R., Kennedy, L.J., Phillimore, L.J., and Pickford, L.J.; Buckley, L.J. dissenting) was read by

Lord Reading, Ch. J.: These two actions are brought for the purpose of determining whether during the war payment of a debt can be enforced by a company of which all the shareholders and directors are alien enemies. In the first action Scrutton, J., affirmed the order of the master, giving leave to sign final judgment under order xiv. In the second, the action was tried before Lush, J., who decided in favor of the plaintiff company. The present appeals are against both judgments and by consent were heard together. They have been ably and elaborately argued, and raise points of considerable importance.

The plaintiffs are a limited liability company incorporated under the companies acts. They carry on business in London at the registered office of the company, and have a number of [902] agencies throughout the United Kingdom. The company was formed in 1905 with a capital of 10,000*l.*, increased in 1908 to 25,000*l.*, to trade in motor-car tyres made in Germany by a company incorporated under German law. The German company formed a number of subsidiary companies in various parts of the world for the sale of these tyres. The plaintiff company was formed for the purpose of selling such tyres in the United Kingdom. At the date of the writ the German company held 23,398 shares in the plaintiff company, and the remaining shares (except one) are now held by subjects of the German Empire residing in Germany. The one share is registered in the name of the secretary of the company, who was born in Germany, resided in London, and in January, 1910, became a naturalized subject of the Crown. The directors are subjects of the German

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Empire and are resident in Germany. The business is managed, according to the evidence of the secretary, by two managers and himself, all three being resident in this country.

In the first case the plaintiff company is the drawer and holder of bills accepted by the defendants for goods supplied before the declaration of war. The bills matured for payment and were presented after the declaration of war. In the second case the plaintiffs' claim is for a balance of account for goods supplied before the war. It is admitted by both defendants (except as to a small amount in the second action) that the goods have been delivered and that payment for them is due, but both defendants have resisted payment on the ground that in the circumstances above stated the plaintiff company was not entitled to receive and could not enforce payment of the debt. The appellants contend that the plaintiff company must be regarded as an alien enemy notwithstanding that it is a limited liability company, and that as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff company must be illegal. They further contend that the court should look at the substance, and not the technicalities, of the matter. If the plaintiff company is to be regarded as an alien enemy, the payment would be illegal under the common law and also under paragraph 5, subparagraph 1, of the Royal Proclamation relating to Trading with the [903] Enemy issued on September 9, 1914, which forbids payment to or for the benefit of an alien enemy, and is a proclamation in force within § 1, subsec. 2, of the trading with the enemy act 1914. The appellants further contend that the directors, having become alien enemies at the outbreak of the war, ceased to be directors of the company, and that as no other directors had been appointed no authority had been or could be given to bring these actions. These contentions require careful consideration.

It cannot be disputed that the plaintiff company is an entity created by statute. It is a company incorporated under the companies acts, and therefore is a thing brought into existence by virtue of statutory enactment. At the outbreak of war it was carrying on business in the United Kingdom; it had contracted to supply goods, it delivered them, and until the outbreak

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of the war it was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? Admittedly it was an English company before the war. An English company cannot by reason of these facts cease to be an English company. It remains an English company regardless of the residence of its shareholders or directors either before or after the declaration of war. Indeed it was not argued by Mr. Gore-Browne that the company ceased to be an entity created under English law, but it was argued that the law in time of war and in reference to trading with the enemy should sweep aside this "technicality," as the entity was described, and should treat the company not as an English company, but as a German company and therefore as an alien enemy. If the creation and existence of the company could be treated as a mere technicality, there would be considerable force in this argument. It is undoubtedly the policy of the law as administered in our courts of justice to regard substance and to disregard form. Justice should not be hindered by mere technicality, but substance must not be treated as form, or swept aside as technicality, because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated [**904**] during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors. A company formed and registered under the companies acts has a real existence, with rights and liabilities as a separate legal entity. It is a different person altogether from the subscribers to the memorandum or the shareholders on the register (per Lord Macnaghten in *Salomon* v. *Salomon & Co.* [1897] A. C. 22, at p. 51, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89. It cannot be technically an English company and substantially a German company except by the use of inaccurate and misleading language. Once it is validly constituted as an English company it is an artificial creation of the legislature, and it retains its existence for all intents and purposes. It is a living thing with a separate existence which cannot be swept aside as a technicality.

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It is not a mere name or mask or cloak or device to conceal the identity of persons, and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by the legislature.

In determining whether a company is an English or foreign corporation, no inquiry is made into the share register for the purpose of ascertaining whether the members of the company are English or foreign. Once a corporation has been created in accordance with the requirements of the law, it is an English company notwithstanding that all its shareholders may be foreign. Just as a foreign corporation does not become British and cease to be foreign if all its members are subjects of the Britsh Crown (per Lord Macnaghten, Lord Brampton, and Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, at pp. 497, 501 and 505, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268). For the appellants' contention to succeed payment to the company must be treated as payment to the shareholders of the company, but a debt due to a company is not a debt due to all or any of its shareholders. *Salomon* v. *Salomon & Co.* The company and the company alone is the creditor entitled to enforce payment of the debt, and empowered to give to the debtor a good and valid discharge. Once this conclusion is reached it follows that payment to the plaintiff company is not payment to the alien enemy shareholders or for their benefit.

[**905**] The same result is arrived at under paragraph 3 of the above-mentioned Proclamation. It defines "enemy" in paragraph 3. "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

Therefore although payment is forbidden "to or for the benefit of an enemy" this prohibition does not apply when payment is made to a company incorporated in this country. Under this Proclamation it appears clear that the test of residence or place

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of carrying on business to determine whether an incorporated body was enemy or not is not to be applied. The company only becomes enemy if incorporated in the enemy country, and as the plaintiff company was not incorporated in the enemy country, enemy character does not attach to it. Further it is provided by § 1, subsec. 2, of the trading with the enemy act 1914, that any transaction permitted by or under any proclamation issued by his Majesty dealing with trading with the enemy shall not be deemed to be trading with the enemy. As by the Proclamation enemy character attaches only to those incorporated in a foreign country, it follows that payment to a company incorporated in this country is not only not forbidden, but is, in our opinion, impliedly permitted. (Both in the Proclamation and the statutes relating to trading with the enemy, the adjective "alien" is not used, doubtless because it was thought superfluous when once "enemy" had been defined.)

It must, however, be clearly understood that any person who, on behalf of the plaintiff company, paid money to shareholders resident or carrying on business in Germany, or to a company incorporated in Germany, would be acting in defiance of the law, and none the less because payment is made in the name of the company. That would be a criminal offense, and would be within the express prohibition of paragraph 5, subparagraph 1, as defined by paragraph 3. The plaintiff company has never claimed any such right, and has explicitly disclaimed any such [906] intention. According to the evidence, money received is paid into the plaintiffs' banking account, and 9,000*l.* per month is drawn out and paid into another account of the plaintiff company at the bank for the purpose of meeting expenses and establishment charges throughout the United Kingdom; the remainder of the money received is left to accumulate in the bank.

It is to be observed that if payment to a company would be payment "to or for the benefit of an enemy" because all the shareholders are enemies and because payment to the company must be regarded as payment to the shareholders, it would seem to follow that payment of a debt to a company which had some enemy shareholders would equally come within the forbidden area. The appellants' answer is that their contention extends at

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most to those companies in which enemy shareholders are in the majority, and in such circumstances as would lead to the conclusion of fact that substantially the company is enemy. Further, if this contention were rejected, it is urged that when, as in the present case, all the shareholders and directors are enemies, there is no room for doubt as to the fact, and a decision in the appellants' favor could be confined to the special facts. There does not appear to be any logical ground for these distinctions. If it were permissible to look behind the existence of the entity, and to regard the character of the individual shareholders in order to determine whether or not the payment is "to or for the benefit of an enemy," the suggested line of demarcation would be wholly arbitrary. If payment to a company with a majority of enemy shareholders is to be regarded as payment to an enemy company, what is the position of the other shareholders? Can it be suggested that the minority consisting of British or neutral shareholders cease to be shareholders in an English company and become members of an enemy corporation?

There is no judicial authority for the proposition of the appellants, and indeed there is a weight of judicial opinion against it. (See *Salomon* v. *Salomon & Co.* [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89, and *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.) *Gramophone and Typewriter* v. *Stanley* [1908] 2 K. B. 89, 77 L. J. K. B. N. S. 834, 99 L. T. N. S. 39, 24 Times L. R. 480, 15 Manson, 251, is a recent instance of the refusal of the court to treat the entity [907] of a company as a mere form or technicality. The Commissioners of Inland Revenue sought to make the Gramophone Company, which was an English company, liable to pay income tax in respect of profits made by a German company in which the English company held all the shares. None of such profits had been received by the English company in this country, but it was sought to treat the profits of the German company for the purpose of income tax as if they were the profits of the English company. The Court of Appeal was of opinion that the business of the German company had not become the business of the English company. Not-

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withstanding that the English company held all the shares in the German company, the English company could not be treated as having any right to the undistributed profits of the German company. *A fortiori* it could not have any right to the payment of a debt due to the German company. See also *Kodak* v. *Clark* [1902] 2 K. B. 450, 71 L. J. K. B. N. S. 791, 67 J. P. 26, 51 Week. Rep. 75, 18 Times L. R. 686, [1903] 1 K. B. 505, 72 L. J. K. B. N. S. 369, 67 J. P. 213, 51 Week. Rep. 459, 88 L. T. N. S. 155, 19 Times L. R. 243.

The argument of the appellants that, although the plaintiff company was an English company in times of peace, it could not be so regarded in time of war, was further supported by Mr. Leslie Scott on the ground that the plaintiff company could not be regarded as a subject of the Crown. He said the company could not be a subject, it had no mind, it could not be loyal or disloyal to the state. He urged that alone the character of the shareholders must determine whose subject the plaintiff company is, and that when all the shareholders are enemy the plaintiff company is enemy. This point was discussed in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268. The litigation arose out of the South African war. The respondent corporation was formed and registered in the Transvaal Republic; most of the shareholders were resident outside the Republic, and were not subjects of it. The appellant, an underwriter and a British subject, objected that the corporation was alien enemy, and could not sue. It was argued for the respondents that the corporation should not be regarded as subject to the laws of the Transvaal and as alien enemy. None of their Lordships favored that view. Some of their Lordships assumed for the purpose of [**908**] the case, but did not decide, that the company remained an alien enemy notwithstanding that most of the shareholders were not alien enemies (see Lord Halsbury, p. 490, Lord Macnaghten, p. 497, and possibly Lord Davey only assumed it, p. 498). Lord Lindley (p. 505) was of opinion that the company must be regarded as resident and carrying on business in the Transvaal and subject to the laws of that country, and he added: "When war broke out the company became an alien

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enemy of this country. See the American case of *Society for the Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, Fed. Cas. No. 13,156. If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries." Lord Brampton, at p. 501, said: "The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders." These opinions are not to be taken as part of the actual decision, nevertheless they are opinions of great weight. In *Daniel* v. *The Award of the Commissioners for Liquidating British Claims on France* (1825) 2 Knapp, P. C. C. 23 and in *Long* v. *the Same* (1825) 2 Knapp, P. C. C. 51, it was held by the Privy Council that a corporation of British subjects existing in a foreign country and under control of a foreign government must be considered as a foreign corporation, and was, therefore, not entitled to claim compensation under a treaty giving this right to British subjects. The corporation was the subject of the foreign state, and not of the British Crown. Even in reference to the ownership of a ship it was held in *The Queen on the Prosecution of the Pacific Steam Navigation Company* v. *Arnaud and Powell* (1846) 16 L. J. Q. B. N. S. 50, 9 Q. B. 806, 11 Jur. 279 that, notwithstanding that some of the members of the corporation were not British subjects but foreigners, the British corporation was the sole owner of the ship and a British subject. None of these authorities lend support to the appellants' argument; they tend rather to assist the plaintiffs' case.

There remains, however, the case decided in 1809, *Bank of* [909] *the United States* v. *Deveaux,* 5 Cranch, 61, 3 L. ed. 38, upon which much reliance was placed by Mr. Leslie Scott. The Supreme Court of the United States there decided that the court could look beyond the corporate name, and notice the character of the individuals who composed the corporation, and treat them substantially as parties to the controversy. The question at issue arose from a peculiarity of the Constitution of the United States. The state courts alone have jurisdiction to try all civil actions except in certain cases reserved by the Constitution and the

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judiciary law to the Federal courts. One of these reserved cases is where a citizen of one state sues a citizen of another. A suit having been brought in the Federal court in the corporate name of the bank, it was held by the Supreme Court that a corporation aggregate cannot in its corporate capacity be a citizen, and, therefore, had no right of access to the Federal court, though it was incorporated in and by one state and was suing the citizen of another state. However, Marshall, Ch. J., who delivered the opinion of the court, held that, although the corporation could not be a citizen, the court could look behind the corporate name to ascertain the individuals composing it, so as to determine whether they were citizens of one state suing the citizens of another. The learned Chief Justice based his judgment upon *City of London* v. *Wood* (1701) 12 Mod. 669, which he treated as an authority for his decision that the court could look behind the corporate name. Upon an examination of that case, and notwithstanding the high authority of the learned Chief Justice, it does not support so sweeping a proposition. It was a case of a very special character. An action was brought by the mayor and commonalty of the city of London in the Court of the Mayor and Aldermen of London. Objection was taken that the mayor, who was the head of the city, without whom the city had no ability or capacity to sue, was also the very person before whom the action was brought for trial. The Court of King's Bench naturally shrank from upholding a judgment given under such circumstances, and held that the objection was fatal, upon the principle that a judge must not be an interested party in the suit before him. A person cannot be both party and judge in the same suit. The familiar instance [910] is that of a judge who is a shareholder in a railway company sued for damages. It is the judge's duty to declare his interest to the parties, and unless they agree to waive any objection he cannot try the case. The absence of such declaration and assent of the parties is the explanation of this case. It is to be observed that in the decisions of our courts this case has not been relied upon, and certainly has not been followed, as an authority for any such proposition as was argued before us.

Since the argument an examination of American authorities

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has disclosed that the case of *Bank of the United States* v. *Deveaux, supra,* has not since its decision found favor in the Supreme Court of the United States. In 1844, in the case of *Louisville Railroad Co.* v. *Letson* (1844) 2 How. 497, at p. 555, 11 L. ed. 353, 376, the Supreme Court thought that that case had gone too far, and held that "a corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. We remark, too, that the cases of Strawbridge and Curtis and the bank and Deveaux have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late Chief Justice who gave them. It is within the knowledge of several of us that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert that a majority of the members of this court have at all time partaken of the same regret, and that whenever a case has occurred on the circuit involving the application of the case of the bank and Deveaux it was yielded to, because the decision had been made, and not because it was thought to be right." In 1896, in the case of *St. Louis and* [911] *San Francisco Railway* v. *James* (1896) 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621, the Supreme Court again approved the view that the bank and Deveaux had gone too far, and held that there was an indisputable legal presumption that a corporation is composed of citizens of the state which created it, and that presumption of citizenship is one of law not to be defeated by evidence to the contrary. Although not binding upon us, the decision of Marshall, Ch. J., and of the Supreme Court is entitled to our very high respect, and this has caused us to give our most careful consideration to this judgment. It is satisfactory to find in the result that the law of the

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United States is that the corporation is regarded as a citizen of the state in which it is created, and is, therefore, not in conflict, but in harmony, with our law.

It was further contended on behalf of the appellants that such technicalities have not been allowed to bind the decisions of the Prize Court, and the case of *The Tommi* [1914] P. 251, 31 Times L. R. 15, 59 Sol. Jo. 26, was cited. The President there said: "The decision as to when property passes is often very difficult when dealing with municipal law. It depends upon fine technicalities; but the like technicalities have not been allowed to bind the decisions of the Prize Courts when transfers of property are attempted when war is actual or imminent. They have been treated as gossamer, which can be wiped entirely aside, because the Prize Court regards the essential qualities of a transaction, and tries to arrive at the realities of the case. . . ." It is sufficient for the purpose of this case to say that in this court we are administering the municipal law and must follow it. In the later case of *The Roumanian* [1915] P. 26, 84 L. J. Prob. N. S. 65, 112 L. T. N. S. 464, 31 Times L. R. 111, 59 Sol. Jo. 206, decided on December 7, 1914, a point more closely resembling that in these appeals came before the President. It was a claim to resist condemnation of the cargo *ex* the vessel on the ground that the owner of the cargo, the Europäische Petroleum Union, though a company incorporated at Bremen under the laws of the Empire of Germany, was in substance and reality a company owned and controlled by companies or firms in allied or neutral countries. In fact only 10 per cent of the shareholders of the company were alien [912] enemies, the other 90 per cent being allies or neutrals. The learned President in giving judgment says: "Neutral bodies and subjects are shareholders to a considerable extent in this company. It is a corporate body duly incorporated under the laws of Germany and as such entered an appearance in these proceedings. There was some discussion in argument as to its constitution, but it was not really denied that it was a German company. It clearly is." The owner of the cargo of oil being therefore an enemy company, the decree for condemnation was made and the German company's claim failed. The decision in *The Roumanian, supra,* shows

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that the character of the entity, and not of the shareholders, was regarded. That is in accordance with the municipal law, and is unfavorable to the appellants' argument before us.

Lastly we were invited to decide against the plaintiff company on the ground that to allow it to recover debts during the war would be against public policy. A somewhat similar argument was addressed to the House of Lords in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268, but it found no favor with any of their Lordships. If the law on this subject had hitherto been in doubt, which it was not, it was firmly and finally settled in that case. Nothing would more easily tend to create uncertainty and confusion in our law than to allow considerations of public policy as distinguished from law based upon public policy to be a ground of judicial decision. See *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. at p. 496. The law is admirably laid down by Parke, B., in *Egerton* v. *Lord Brownlow and Others* (1853) 4 H. L. Cas. 1, at p. 123, 23 L. J. Ch. N. S. 348, 18 Jur. 71, 24 Eng. Rul. Cas. 118 and quoted by Lord Halsbury in *Janson's Case* [1902] A. C. at p. 496. "It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to [913] speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

These weighty and well-chosen words uttered by a master of

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the common law and approved in 1902 by the House of Lords are a conclusive answer to the argument addressed to us on public policy.

The second ground of appeal was that there was no authority in the solicitor to issue a writ or to continue this action on behalf of the plaintiff company. In the first place such an objection must be raised by a proceeding to strike out the case, and cannot be heard at the trial as a defense to the action. It is the invariable practice of the court to require the challenge to be made by such a proceeding, and not to allow the point to be taken at the hearing. See *Richmond* v. *Branson & Son* [1914] 1 Ch. 968, 83 L. J. Ch. N. S. 749, 110 L. T. N. S. 763, 58 Sol. Jo. 455, per Warrington, J. It is very desirable that this practice should be maintained, and that this procedure should be the only mode of challenging the solicitor's retainer. Lush, J., evidently doubted whether the point could be raised by way of defense, but in view of his finding it was not necessary for him to decide it. We do not wish to rest our decision entirely upon an objection of procedure, as we agree with Lush, J., that upon the evidence before him there was sufficient ground for holding that the authority had been established. The argument was that the directors alone could issue instructions to sue, and that as from the outbreak of war the directors' authority to manage and control the affairs of an English company was revoked and no other directors had been appointed, there was no person in existence who could give authority. But assuming that there were no directors, the company's business was still being conducted, the managers and secretary were in attendance, agents, [914] clerks, and others were still employed; a sum of 9,000*l.* per month was being drawn and distributed in the United Kingdom. The company's affairs were not at a standstill notwithstanding that they could not import goods from or remit money to Germany or the German company, or engage in commercial intercourse with it. The secretary had been in the habit of giving instructions to the solicitor to commence proceedings; he said such matters had always been left to him and that he had authority to issue the writ. That is the evidence accepted by the judge as fact. Has such authority

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been revoked since the outbreak of war? There is no evidence to that effect, neither is there any revocation by operation of law. The directors act on behalf of the company, and though they may cease to exist the company still lives. The management and the secretary derive their authority, not from the directors, but from the company, given by the directors as the representatives of the company, and that authority from the company to act for it continues until revoked.

The appellants have failed to establish that there was no authority in the secretary to give instructions for the issue of the writ.

It is advisable for future guidance to deal with one argument of Mr. Campbell for the plaintiff company. He contended that as a person had been appointed by the Board of Trade under § 2, subsec. 2, of the trading with the enemy act 1914, with authority to inspect the plaintiff company's books and documents and to require information as to the business carried on by the plaintiff company, the plaintiff company must be assumed to have been impliedly licensed to trade under the protection of the Crown or authorized by the Executive to carry on business in this country. Such a license or authority to trade is, in our judgment, not to be implied from the words of the statute. The legislature intended that during the war there should be certain powers vested in the Executive without any warrant from a justice to obtain information as to whether or not a person, firm, or company was trading with the enemy, and under subsec. 2 (b) prescribed the conditions precedent to the exercise of these powers in the case of a company. The powers may be exercised when one third or more of the issued share capital or of the directorate of the company is [915] held by alien enemies, that is, persons resident or carrying on business in an enemy state or by subjects of an enemy state, notwithstanding that they may be resident or carrying on business in this country. Parliament deemed it advisable in such cases to confer special powers on the Executive to be exercised if the Executive deemed it expedient. If it suspected that the company was trading with the enemy, information could be obtained from the books and documents of the company and from inquiry of any person able to give information

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as to the business of the company, and, under § 13 of the trading with the enemy amendment act 1914, such information could be used in evidence against the informant. The whole object of § 2 was to provide means of information in cases which might naturally in time of war give rise to suspicion that assistance was being rendered to the enemy; it is an extra precaution. It is merely a section enabling the Executive to take steps which otherwise could not be taken for the protection of national interests during the war, and it is not in our opinion to be construed as giving a license or authority to trade when such license or authority were required.

In our opinion both appeals must be dismissed, with costs. This is the judgment of all the members of the court except Buckley, L.J. The late Kennedy, L.J., had read the judgment I have just delivered and approved it before his death.

The following judgment was read by

Buckley, L.J.: I regret that I am unable to concur in the judgment just delivered. I regard the question as so momentous that I make no apology for stating as clearly as I am able my reasons for arriving at a contrary conclusion.

The artificial legal entity created by incorporation under the companies acts is a legal person existing apart from its corporators. This proposition is true without exception, and nothing in this judgment questions the proposition in any way. If there be twelve corporators one of them is not a twelfth or any other part of the corporation. The total number of twelve do not in the aggregate constitute the corporation. On the other hand the corporation cannot exist without corporators. If [916] there are no corporators there can be no corporation. Corporators are essential to the existence of, but form no part of, the corporation.

The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions. It cannot wear weapons nor serve in the wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor

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intentions, for it has no mind other than the minds of the corporators. These considerations seem to me essential to bear in mind in determining the present case.

The corporation, if it be a British corporation, stands in the same position for most purposes as a British subject. For instance, as regards rights of ownership of property and the right to protection and assistance by the law. But while it stands for most purposes in the position of a British subject, it cannot, I think, be correctly described as a British subject. A subject must, I conceive, be one who can owe and pay allegiance to the King, who can serve the King physically; for instance, if he be a male, by wearing weapons and serving in the wars, who has a mind and can be either loyal or disloyal to the King. None of these can be predicated of the abstract legal entity. It has no existence at all except in contemplation of law. If these propositions be true, as I think they are, they seem to me to go to the root of the question which has in this case to be determined.

This corporation is one which as a corporation certainly has in law an independent legal existence and that legal person is British. But on the other hand all its directors are Germans resident in Germany. The holders of all its 25,000 shares except one share are Germans resident in Germany. The artificial legal thing is British, resident in England. But all its corporators who can have thoughts, wishes, or intentions are Germans resident in Germany.

The question for determination is whether, when all the natural persons who express and give effect to their wishes through the corporation as a legal abstraction are Germans [917] resident in Germany, the corporation can sue in this country because those persons who could not sue are as matter of law absorbed in a separate legal person which is British and which (regarding the corporation as a legal person existing apart from and irrespective of its corporators) can sue.

The contractual relations constituted by membership in a corporation under the companies acts are singular. The relation between each corporator and the corporation is a contractual relation governed by the statute, involving rights within the corporation, rights against the corporation, and liabilities towards

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the corporation. Where the corporator is an alien enemy these relations may be vitally affected by a state of war. The motive power of the corporation (which in itself apart from its corporators, or its agents—appointed and authorized through acts done by the corporators—has no life and no power of action) may become paralyzed and suspended by the existence of war in a case where every corporator is as an alien enemy under disability as such.

Suppose the case of a corporation sole. A private company may be formed consisting of only two persons. It was much debated a few years ago whether the law should not be so altered as to allow a sole person to incorporate himself as a company with limited liability. Suppose that were the law, and an individual German resident in Germany, an alien enemy in fact, became incorporated here as a British company, could it be seriously contended that in time of war that alien enemy, because he had acquired a legal corporate name and had an artificial legal existence in this country, was consequently for the present purpose not an alien enemy? Does it make any difference that there must be two persons, or again does it make a difference that the number is seven or ten? The number of corporators in the present company is six.

The immense importance of the question whether it is impossible for any purpose to look behind the corporation at the person of the corporator may be illustrated by the case of merchant shipping. Under § 1 (d) of the merchant shipping act 1894, ships owned by a shipping company incorporated in this country are British ships. The individual members of that body [918] corporate may be aliens. If the personality of the corporators can for no purpose be regarded, there is nothing to prevent alien enemies from owning and sailing British ships under the British flag. If this judgment be (as having regard to the judgment of the other members of the court I must assume that it is) wrong, the matter is one which calls urgently for legislation.

The proposition that an alien enemy cannot sue rests, I conceive, upon the proposition that such an one cannot approach the King, has no resort to the King, and cannot invoke the assistance

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of the King. The court is the King's court. The alien enemy cannot come into that court or have the assistance of that court, because the court is for judicial purposes the King sitting in his court, and the alien enemy cannot approach him. Take the assumed case of the sole person incorporated as I have supposed; can that sole person be entitled to access to the King and assistance from the King because in contemplation of law he is entitled to clothe and has clothed himself in a British dress, and notionally, but not in fact, is British? Take the case of two Germans who had formed a private company; can they approach the King? Take the present case of six Germans; can they approach the King? To say that they can because it is not they, but the British corporation, which approaches the King, seems to me to be unsound. The proposition that it is the British corporation, and not the corporators, which as matter of legal intendment comes into court, is true, but for the relevant purpose it is not true. The artificial legal entity has no independent power of motion. It is moved by the corporators. It is the German corporator who, under the corporate name but still German for the relevant purpose of friendliness or enmity, is the person who comes. He is German in fact although British in form.

The question is not wholly without authority which may be a guide. In *City of London* v. *Wood* (1701) 12 Mod. 669, the city of London brought a suit against Wood by their corporate name in the Mayor's Court. Objection was taken that the court had no jurisdiction by reason of the fact that the court was held before the mayor and aldermen and the action brought in the names [919] of the mayor and commonalty, and that it is against all law that the same person should be party and judge in the same cause. The objection rested, therefore, upon the character of the individuals who were members of the corporation. The judges were unanimous in holding that they could look beyond the corporate name and notice the character of the individual. In *Bank of the United States* v. *Deveaux* (1809) 5 Cranch, 61, 3 L. ed. 38, the principle of that case was followed in the United States in the case of a suit brought by a corporation aggregate composed of citizens of one state against the citizens of another state in the circuit court of the United States. The jurisdiction

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of that court was limited to controversies between citizens of different states. The court affirmed (see p. 86) that the artificial legal entity, the corporation aggregate, was not a citizen, and could not sue unless the rights of the members in this respect could be exercised in their corporate name, and that the court had consequently no jurisdiction unless it could regard the rights of the members in the corporation, for they were citizens. The view the court took was (see p. 91) that the controversy was substantially between aliens suing by a corporate name and a citizen; or between citizens of one state suing by a corporate name and those of another state. "That name," said Marshall, Ch. J., at p. 87 (meaning the corporation by the corporate name), "cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted." The court accordingly upheld the jurisdiction. Referring to this case, Story, J., in giving judgment in *Society for the Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, at p. 133, Fed. Cas. No. 13,156, said: "But in the character of its members, as *aliens,* we have incontestable authority to enforce the corporate rights; and it has been solemnly settled by the Supreme Court, that for this purpose the court will go behind the corporate name, and see who are the parties really interested. And if, for this purpose, the court will ascertain who the corporators are, it seems to follow that the character of the corporators may be averred, not only to sustain, but also to [**920**] bar, an action brought in the name of the corporation. It might therefore have been pleaded in this case, even if the corporation had been established in a neutral country, that all its members were alien enemies; and upon such a plea, with proper averments, it would have deserved great consideration, whether it was not, *pendente bello,* an effectual bar." In my opinion the principles laid down in those cases are correct, and none the less because they have, as the Lord Chief Justice has pointed out, been subsequently observed upon in the United States.

In *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L.

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R. 796, 7 Com. Cas. 268, I do not find any decision to the contrary. The decision there was against the underwriter. The objection that the company was an alien enemy was in his favor. The House made the assumption in his favor and nevertheless decided against him. It was therefore unnecessary to decide the point, and what was said by the noble and learned Lords was only *dictum*. Lord Halsbury (p. 490), Lord Macnaghten (p. 497), and Lord Davey (as I read his judgment) at p. 498, in fact assumed it, as distinguished from deciding it. Lord Brampton (p. 501) may be read as deciding it, and Lord Lindley (p. 505) perhaps even more plainly so. But it cannot be said that the House decided it when it did not arise for decision, and some at any rate of its members plainly abstained from deciding it and stated that they assumed it for the purpose of the decision.

An argument has been advanced that some language in the act of 1914 and the Proclamation made under it bears upon the question,—I think not.

I find in § 2, subsec. 2(b), of the trading with the enemy act 1914, neither license nor recognition relevant in the matter. The subjects of the enemy state there spoken of may be subjects resident in Great Britain and consequently not alien enemies. They may be British subjects resident or carrying on business in the foreign state, and thus alien enemies by residence, and not by nationality. There are many cases to which the subsection may relate without making the assumption that it relates to a company in which all the corporators are subjects of the enemy state residing in the enemy state. To operate as a license or [921] recognition, the words of the statute ought, I apprehend, to be plain. So far from their being plain, it seems to me that it is only by a strained construction that the words can be made relevant to the subject-matter at all.

The definition of enemy in the Proclamation of September 9, 1914, has, in my opinion, no bearing upon the matter. A Proclamation can neither make nor declare the law, and even if it could that definition does not affect so to do. It does no more than attribute a meaning to a particular word in a particular document. The last words of the article upon which the question arises seem to me, moreover, very obscure. Strictly read it

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would seem that according to the definition enemy character would not attach to a British corporation resident (as it may be) or carrying on business (as it may do) in the enemy country when it does attach to a natural person so resident or carrying on business. The reason of the difference is far to seek.

For the above reasons I am of opinion that the Continental Tyre Company stand for the present purpose in the position of alien enemies, for that, to use the language of *Bank of the United States* v. *Deveaux* (1809) 5 Cranch, at p. 91, 3 L. ed. 46, the action is by "aliens suing by a corporate name." I therefore think that these appeals should be allowed. The right form of order, I think, would be to set aside the service of the writ and to order the plaintiffs to pay the costs of the action.

Appeals dismissed.

Solicitors for plaintiffs: *Stephenson, Harwood, & Co.*

Solicitors for Daimler Company: *Andrew Wood, Purves, & Sutton, for R. A. Rotherham, Coventry.*

Solicitors for Thomas Tilling, Limited: *Hicklin, Washington, & Pasmore.*

Note.—Status of corporation as alien enemy.

Aside from the conception of a corporation as a distinct entity apart from its shareholders, the practical considerations arising from a possible diversity in the nationality of its shareholders make the only feasible rule the one which the courts have adopted; namely, that the status of a corporation as an alien enemy is determined by the place of its organization.

During a state of war, however, an alien enemy is not entitled to exercise the right of voting as a shareholder in a domestic corporation. *Robson* v. *Premier Oil & Pipe Line Co.* [1915] 2 Ch. 124.

In one of the decisions (*Continental Tyre & Rubber Co.* v. *Thomas Tilling* (1914) 31 Times L. R. 77), affirmed by the Court of Appeal in the opinion above reported, the court below said: "To say that one must ascertain who the shareholders in a company are, and what their nationality is, involves a misconception. A company does not contract on their behalf or as their agents. It does not necessarily contract even indirectly for their benefit. The persons really interested in the trading by a limited company may be creditors or debenture holders."

In *Amorduct Mfg. Co.* v. *De Fries* (1914) 112 L. T. N. S. 131, 84

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L. J. K. B. N. S. 586, 31 Times L. R. 69, 59 Sol. Jo. 91, it was held that the court could not take into consideration the nationality of the stockholders of a company registered under English law, but that such a corporation was able to sue notwithstanding the greater number of its shareholders were alien enemies who would not be entitled to sue on their own account as individuals.

In *The Poona* (1915) 31 Times L. R. 411, 112 L. T. N. S. 782, 59 Sol. Jo. 511, it is held that goods belonging to an English company are not subject to condemnation as prize by reason of the fact that all the directors are enemy subjects and all the shareholders are either enemy subjects or resident in an enemy state.

A corporation constituted according to the laws of a foreign state is a subject of that state and an alien irrespective of the nationality of its shareholders. *Janson* v. *Driefontein Consol. Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.

In *Society for Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, Fed. Cas. No. 13,156, it is said that where a corporation is established in a foreign country by a foreign government it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile it may, for some purposes at least, be clothed with the same character.

In the same case it was also said that even if the corporation is established in a neutral country it may be that a plea setting up that all its members were alien enemies would be an effectual bar to the maintenance of an action during the continuance of the war.

In *The Pedro* (1899) 175 U. S. 354, 44 L. ed. 195, 20 Sup. Ct. Rep. 138 (affirming 87 Fed. 927), it was held that a vessel owned by a Spanish corporation, having a Spanish registry, sailing under the Spanish flag and with a Spanish license, and officered and manned by Spaniards, must be deemed a Spanish vessel for the purposes of capture as a prize, though British subjects were the legal owners of some and the equitable owners of the rest of the stock in the corporation, and intended to restore the vessel to British registry if war rendered the change desirable.

In *The Roumanian* [1915] P. 26, 84 L. J. Prob. N. S. 65, 112 L. T. N. S. 464, 31 Times L. R. 111, 59 Sol. Jo. 206, a corporation duly incorporated under the laws of Germany was held, for prize purposes, to be an enemy, although the company was in nature of a combine, including to the extent of 90 per cent of the shares Roumanian, Russian, and other companies, neutral or allied.

So, also, it is held that the property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicil of the partners. *The Friendschaft* (1819) 4 Wheat. 105, 4 L. ed. 525; *The Cheshire* (1865) 3 Wall. 231, 18 L.

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ed. 175; *The San Jose Indiano* (1814) 2 Gall. 268, Fed. Cas. No. 12,322.

"The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is therefore treated as enemy's property notwithstanding the neutral domicil of any of the company." *The Friendschaft, supra.*

"Such a trade so carried on has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It subserves his manufactures and industry; and its whole profits accumulate and circulate in his dominions and become regular objects of taxation in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he who thus enjoys the protection and benefits of the enemy's country should not in reference to such a trade share its dangers and its losses. It would be too much to hold him entitled by a mere neutral residence to carry on a substantially hostile commerce and at the same time possess all the advantages of a neutral character." Per Story, J., in *The San Jose Indiano, supra.*

In *Juragua Iron Co.* v. *United States* (1908) 212 U. S. 297, 53 L. ed. 520, 29 Sup. Ct. Rep. 385, it was held that an American corporation doing business in Cuba was, during the war with Spain, an enemy to the United States with respect of its property found and then used in Cuba, and such property could be regarded as enemy's property liable to be seized and confiscated by the United States in the progress of the war.

This is, of course, simply an application of the rule governing cases of property owned by individuals, which, however, is in process of change, the trend of modern opinion being toward the view that the subject of one country surprised by a declaration of war in the country where he has a commercial domicil ought to have time allowed him to free himself from his commercial engagements and effect a removal of his property. See *Nigel Gold Min. Co.* v. *Hoade* [1901] 2 K. B. 849, 70 L. J. K. B. N. S. 1006, 50 Week. Rep. 108, 85 L. T. N. S. 482, 17 Times L. R. 711, in which it was held that, for the purpose of determining the validity of a policy of insurance against seizure, the property in question was not to be regarded at the time of the seizure as enemy's property merely by reason of the commercial domicil of the owner, a Natal company engaged in mining in the Transvaal, when war was declared.

In *Société Anonyme Belge des Mines d'Aljustrel* v. *Anglo-Belgian Agency, Ltd.* [1915] 2 Ch. 404, it was held that a company incorporated in Belgium was not given the status of an alien enemy by the fact that a large portion of that country, including the city in which the company had its registered office, was in the effective military

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occupation of an enemy. It appeared, however, that the business of the corporation had been, since the outbreak of the war, wholly carried on outside of Belgium.

Where a foreign corporation is admitted to do business in the state, its obligations are affected by a war in which the state is involved, in the same manner as though it were a domestic corporation of that state. *Martine* v. *International L. Ins. Soc.* (1873) 53 N. Y. 339, 13 Am. Rep. 529. E. S. O.

[ENGLISH DIVISIONAL COURT.]

WALTER *v.* ASHTON.

[1902] 2 Ch. 282.

Also Reported in 71 L. J. Ch. N. S. 839, 18 Times L. R. 445, 51 Week. Rep. 131.

Injunction — Unauthorized use of name — Holding out as partner — Misrepresentation — Reasonable probability of risk and liability.

A dealer in cycles having advertised his goods in a manner which satisfied the court that he intended the public to believe that the proprietors of the Times newspaper were either the vendors, for whom he acted as manager, or partners, or in some way responsibly connected with the sale of "Times" cycles:—

Held, on the authority of *Routh* v. *Webster* (1847) 10 Beav. 561, that as the plaintiffs, the proprietors of the Times, were exposed to some risk and liability by the unauthorized use of the name of their newspaper by the defendant, and that as there was a reasonable probability of the Times being exposed to litigation, and possibly being made responsible, had the plaintiffs not taken steps to disconnect the name of their newspaper from the advertisement and circulars issued by the defendant, an interim injunction ought to be granted restraining the defendant from in any way representing that the cycles offered by him for sale were in fact offered for sale by the plaintiffs, or that he was carrying on business as a department of the Times, or in any way holding out the Times to be the owners of or connected with his business.

Principles on which injunctions are granted in cases of this nature discussed.

(March 20, 1902.)

MOTION.

This action was brought by the plaintiff, on behalf of himself and all other the proprietors of the Times newspaper, to restrain

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the defendant from advertising the sale of his cycles in such a way as to suggest or represent that he was carrying on business as a department of, or in connection with, the Times. An application was now made for an interim injunction restraining the defendant, his manager, servants, and agents "from publishing advertisements, and issuing or distributing circulars or letters containing statements asserting or suggesting that cycles offered by him for sale are in fact offered for sale by the proprietors of the Times newspaper, and from representing that he is carrying on business as a department of or in connection with the Times, or in any way holding out [283] the Times newspaper, or the proprietors thereof, to be the owners of his business."

The circumstances in which the application was made were shortly as follows: For some time past the proprietors of the Times had been in the habit of issuing literary productions to be purchased by instalments, and amongst other works so issued were the Encyclopædia Britannica, the Century Dictionary, and the Times Atlas. A circular announcing the sale of these works was sent out to persons likely to buy, and with the circulars were inclosed envelops for reply. These circulars, which were typewritten on thin paper, were headed, in old English letters, "the Times," and were signed at the foot, "Yours faithfully, the Manager." The envelops inclosed, which were generally of a pale green color, had the address printed on them to "the Manager, the Times, Printing House Square."

It appeared that the defendant had some time since devised a scheme for selling bicycles by instalments, but giving immediate delivery of the bicycles in a similar way to that in which the Times had sold the "Encyclopædia Britannica;" and accordingly he associated himself with the Daily Express newspaper, and advertised his cycles in that paper, and had, as was stated, a very large sale for them. Shortly afterwards the defendant devised a fresh scheme for selling another kind of cycle, which he called "the Times Bicycles."

On February 27, 1902, the manager of the Times received two letters calling his attention to an advertisement of "the Times" cycles in the Daily Mail of that date; one letter inclosed

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a circular, and continued: "Kindly advise me whether this is in connection with your newspaper. It appears to me to be merely an imitation of the letter I received from you in reference to the Encyclopædia Britannica."

The material parts of this advertisement were as follows: "The Times cycle, fitted with Dunlop tires." "When the Daily Express cycle scheme was started, no less than 657 orders were received the first day of the offer, yet a heavy cash payment had to be made beforehand, a promissory note had to be signed, and in nearly every instance a guarantying householder [284] was required. 'Express' cycles (excellent though they were) were not fitted with Dunlop tires. The Times cycle is the only bicycle that can be obtained on the Times system of monthly payments; forwarded on approval for 5*s*. All communications must be addressed to the manager." On the same day a circular was also seen by the manager of the Times, which was type-written, on thin paper, headed "Times Cycles," in old English, 59 and 60 Chancery Lane. The material parts of this circular ran as follows: "Dear Sir,—You doubtless remember the phenomenal success of the Daily Express cycle schemes." The circular then went on to give some of the disadvantages of that system, and continued: "With Times cycles no promissory note is to be signed, no references are required, &c. We take the entire risk and responsibility, and, having a capital of over 100,000*l*. at our command for immediate use if need be, we are able to withstand almost any financial strain. . . . Please remember—and the Daily Express will be able to confirm this statement—that hundreds of orders requiring immediate execution had to be refused by that newspaper, owing to the enormous demand for their cycles. There is even a greater possibility of our being unfortunately in a like position, but by forwarding the request at the foot of this advance letter, together with a crossed P. O. for 5*s*., or by calling here, and paying the money at our office to-day or to-morrow, when the machines can be seen and inspected, you will be doing all that is possible to secure immediate delivery." This was signed, "Yours faithfully, the Manager." It appeared that inclosed with this circular was a pale green envelop addressed for reply as follows: "Times"—

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Royal arms—"Cycles" (old English). The "Times" (old English) Cycle Department, 59 and 60 Chancery Lane. As several inquiries had been made at the Times office since the issue of these advertisements, to know whether they really had been issued by the proprietors of the Times, the writ in the present action was issued with a view to putting an end to this method of advertisement by the defendant. Some difficulty had been experienced in finding out who "the Manager" referred to in the circular was, and in effecting service of this writ upon him [285] when it was discovered that he was the defendant; for though the names of the makers of the tires were given in the advertisements and circulars and the names of the manufacturers of the cycles were also specified, there was no reference to the name of the defendant. It also appeared that in the windows of the defendant's offices looking on to Chancery Lane were the words "the Times" in old English, and beneath it the word "cycles" in another type; that outside the office was a man in livery, with the word "Times" on his cap; and that the pamphlets that were in the shop had outside them "the Times Cycles." It was also stated during the course of the hearing of this motion that a clock, with the fingers pointing to 5 minutes past 6, as in the clock in the Times newspaper, was stamped or painted in gold on these cycles. The defendant in his affidavit stated that there had never been any intention on his part to avoid service of the writ in this action, and that he never had any intention of holding out to the public that there was any connection between his cycles and the Times newspaper. He denied that the circular sent out by him had been compiled from that used by the proprietors of the Times, and that the envelops inclosed were imitations of those used by the Times, and deposed that a clock was a very common design for commercial purposes, that for a cycle to have the same name as a newspaper which had absolutely no connection with the manufacturing firm was a common custom, and he gave numerous instances, such as "Times" cycles, "Telegraph" cycles, "Standard" cycles, "Globe" cycles, "Tit-Bits" cycles, and "Express" cycles, which had been manufactured by the various firms mentioned in his affidavit; but he also admitted that he had had two or three inquiries in his office asking whether

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there was any connection with himself and the Times, which he of course denied.

Levett, K.C., and **MacSwinney**, for the plaintiff. No one has a right to hold out another person as his partner in business; and upon the plaintiff showing that the defendant is holding out the Times as his partners, he is entitled to an [**286**] injunction. *Burchell* v. *Wilde* [1900] 1 Ch. 551, 563, 69 L. J. Ch. N. S. 314, 48 Week. Rep. 491, 82 L. T. N. S. 476, 16 Times L. R. 257. The defendant's method of advertising suggests that the Times is in partnership with him, or at any rate that he is carrying on a department of the Times: the natural inference to be drawn from these advertisements is that they were issued in connection with a newspaper, and that newspaper is the Times. The paper and type of the Times circular has been copied, also the signature, "the Manager," as were the green envelops, which, besides having on them "the Times" and the Royal arms, are addressed to "the Times Cycle Department." By acts of this kind the defendant is committing a deliberate fraud on the Times and the public by inducing persons to believe that his business is carried on in connection with, or as a department of, the Times. The plaintiff makes no claim to the exclusive use of the words "Times" or "the Times" or "the Times system of payment," if fairly used; what the plaintiff does complain of is the way these words have been used by the defendant so as to mislead the public for his own purposes to the discredit and injury of the plaintiff. When the court finds a series of coincidences all tending one way, the only conclusion to be drawn is that they are not coincidences, but acts designedly committed for the purpose of misleading the public, and thereby obtaining some unfair advantage. Evidence of intention to deceive is not necessary in a case like the present. *Saxlehner* v. *Apollinaris Co.* [1897] 1 Ch. 893, 66 L. J. Ch. N. S. 533, 76 L. T. N. S. 617. If the court is driven to the conclusion that what is done is done with the intention of deceiving the public, it may assume an occasional success, and consequent loss to the plaintiff. *Slazenger & Sons* v. *Feltham & Co.* (1889) 6 Rep. Pat. Cas. 531. The defendant's mode of advertising, if not stopped at once by an interim in-

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junction, may involve the Times in liability for selling worthless cycles, or expose it to litigation.

Norton, K.C., and **E. Ford,** for the defendant. The defendant is entitled to use a clock on his bicycles, or on any articles sold by him which are not literary productions. Even supposing the plaintiff had registered a clock as his trademark, he could not thereby acquire an exclusive right to it for all trades or [287] businesses. *Edwards* v. *Dennis* (1885) 30 Ch. D. 454, 55 L. J. Ch. N. S. 125, 54 L. T. N. S. 112; *In re Hudson's Trademarks* (1886) 32 Ch. D. 311, 55 L. J. Ch. N. S. 531, 55 L. T. N. S. 228, 34 Week. Rep. 616; *Hart* v. *Colley* (1890) 44 Ch. D. 193, 59 L. J. Ch. N. S. 355, 62 L. T. N. S. 623, 38 Week. Rep. 440; [*Eno* v. *Dunn* (1890) 15 App. Cas. 252, 63 L. T. N. S. 6, 39 Week. Rep. 161, and *In re Australian Wine Importers* (1889) 41 Ch. D. 278, 58 L. J. Ch. N. S. 380, 60 L. T. N. S. 436, 37 Week. Rep. 578, were also referred to.] There is no connection between literary productions such as the Times or "Encyclopædia Britannica" and cycles; or between the newspaper trade and the cycle trade, and the plaintiff could not therefore have registered the clock as a trademark so as to interfere with the defendant's use of it on cycles. *In re John Batt & Co.'s Trade-marks* [1898] 2 Ch. 432, and *John Batt & Co.* v. *Dunnett* [1899] A. C. 428, 68 L. J. Ch. N. S. 557, 81 L. T. N. S. 94, 15 Times L. R. 424, 16 R. P. C. 411. There is no copyright in the word "Times" or "the Times" as applied to cycles; the plaintiff had no exclusive right to use old English or Gothic type, or the Royal arms, both being used by other newspapers, apart from their use for numerous other commercial undertakings; and if this is kept in mind in reading the advertisements and circulars, there is nothing in them which, fairly construed, amounts to a representation that the defendant is holding himself out as being connected with the Times, or as a department of the Times. The Times system of payment by instalments is now a well-known system of purchase, and the defendant is entitled to call his system of payments by that name, and to call his cycles "Times Cycles." Though inquiries have been made at the Times office and of the defendant, there is no evidence that anyone has been deceived, neither has the plaintiff

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proved any injury to the Times or any probability of injury; he has therefore made out no case for an injunction, much less an interim injunction. *Burchell* v. *Wilde* [1900] 1 Ch. 551, 563, 69 L. J. Ch. N. S. 314, 48 Week. Rep. 491, 82 L. T. N. S. 576, 16 Times L. R. 257, relied on by the plaintiff, was a dispute between persons who had been partners, and has no application to a case like the present.

Levett, K.C., in reply. The defendant's name has never appeared in any of the advertisements or circulars; all applications are to be addressed to "the Manager;" the defendant is not a "manager" in the commonly accepted meaning of the word; the business is his own business, and to describe himself [288] as "manager" is not an honest way of describing himself. All these acts are done with the intention of deceiving the public and obtaining some unfair advantage; they may cause the plaintiff an injury; if not stopped there is every probability that some damage will be caused; it is a fraud on the public which ought at once to be stopped by injunction.

Cur. adv. vult.

Byrne, J.: As this case presents some elements of great importance and of some novelty, I should have preferred postponing my judgment until I could have put it into writing; but the case is one of a somewhat pressing nature, and it is of importance to the parties that they should have a speedy decision. The action is brought by the plaintiff on behalf of himself and the proprietors of the Times, asking for an injunction, and application is now made for an interim injunction in the following terms: [His Lordship read the terms of the injunction, and continued:—]

Now, it is no part of the general business of a newspaper to carry on a cycle business, and this is not a question arising between rivals in trade. It appears to me that to entitle the plaintiffs to an interlocutory injunction they have to establish, first, that the defendant has represented the plaintiffs as his principals or partners, or, at least, as responsibly connected with his venture; and, secondly, that there is tangible probability of

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injury to the property of the plaintiffs in consequence of such representations. Mere annoyance is not enough, nor libel, not being trade libel; nor is a shadowy possibility of actions being brought enough. The case has to be considered apart from those cases turning on trade competition, infringement of rights, tradenames, trademark, or the ordinary passing off equity. The plaintiffs have, I think, founded their notice of motion on the only ground upon which, if at all, they are entitled to succeed upon the present application. Now the short history of the case is this. [Having stated the facts as above, his Lordship continued:—]

Beyond the letters to the manager of the Times (in neither [289] of which can I infer that the particular persons writing were themselves actually deceived, although put upon inquiry) there is no direct evidence that anyone has yet been actually deceived into thinking that the cycles advertised for sale are the cycles of the Times newspaper. The defendant himself says that amongst his callers only three persons had asked him whether he had any connection with the Times newspaper. That, of course, may be read and considered in two ways. It may be that so many people had been satisfied that it was a department of the Times, and that it was in connection with the Times, that they did not even think it worth asking, or it may be they thought it was so unlikely the Times would be connected with it that they did not ask. At any rate, it leaves it quite open to this observation, that three persons thought it probable that the Times had something to do with it, and by letter two persons made inquiries; and it is also quite open to this, that persons may have been deceived into thinking that the sales were by or in connection with the Times newspaper. There are one or two other matters I ought to refer to. One is that on application to the defendant's office—"the Times" cycle office—the person inquiring was handed certain documents with "Times" in the same type, between inverted commas, then the Royal arms, and then "Cycles" on the other side, "With Dunlop tires." Inside there were two advertisement books, one being simply an advertisement of the Dunlop tires, and the other being an advertisement in connection with the defendant's cycles that speaks of the cycle

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as "'the Times'" (in inverted commas) "Cycle," and refers to the Daily Express system and to the Times system. Besides this, the defendant uses and gives away a little book, which is headed "The Times" (in ordinary type capitals between inverted commas) "Cycle, manufactured at the Birmingham Ordnance Works." Then, a little lower down, "Cycle offices and show rooms, 59 and 60 Chancery Lane, Holborn, London, W.C." And then a puff beginning, "Millions of cycles." On page 3 of that I come across, in large letters at the head of it, "The Times" (in inverted commas) "Cycle"—not "Times," but "the Times" —"made by the Birmingham Ordnance and [290] Engineering Company, is so called because it is, *per se*, a bicycle of the latest design, of the highest quality, and of faultless workmanship, and is, in fact, right up to the times, and supplied to the public, as no other cycles are, on the Times system of monthly payments. They can be seen (where orders can be booked) at 59 and 60 Chancery Lane, London, W.C." Then further on, after a good deal of puff, seven substantial replies to questions are given. "Who are the actual manufacturers? Answer.—The Birmingham Ordnance and Engineering Company." Then later on again, "Anticipating the sale of many thousands of 'the Times' cycles, we have made large contracts for tires and tubing, and with big Sheffield, Coventry, and Birmingham houses for the supply of the raw material. All business will come through London in the first place." From beginning to end, although they mention the names of the makers who supply the tires, and the names of the manufacturers, there is no reference to the name of the defendant, or to any other identification of the place where they are sold than the name of "the Times Cycle," and the address "59 and 60 Chancery Lane, Holborn, London, W.C." Taking all those matters together, and having regard to the circulars, the advertisements, and the general conduct of the business carried on by the defendant in reference to these cycles, I have come to the conclusion on the present materials that he has intended to induce people to think either that the proprietors of the Times are the vendors, for whom the person in Chancery Lane, whoever he may be, is the manager of the department, or that they are partners, or in some way pecuniarily and with

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responsibility connected with the sale of these articles. Now, as I have said, this not being a case as between rival traders, and not being a case turning upon contract, it is not enough to show a probability of deception of the public for the purpose of this interlocutory injunction, or to show that persons may be deceived into thinking that these cycles are the manufacture or the property of the Times newspaper; that alone would not be sufficient for the present purpose. I think you must show some probable risk of injury by what has been done. Now, how do the authorities [**291**] stand in reference to this matter? I think one of the earliest I need refer to is *Routh* v. *Webster* (1847) 10 Beav. 561. In that case a joint stock company called "the Economic Conveyance Company" was established to carry passengers by steamboat and omnibus at the average rate of 1*d.* a mile. The defendants, the provisional directors, had published prospectuses, in which the name of the plaintiff was used, without his authority, as a trustee for the company. They also paid moneys into the bankers of the company to the plaintiff's account as trustee. The plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the directors, and moved for an injunction to restrain them from using his name in connection with the company. It was argued that the defendants ought to be prevented from using the plaintiff's name in this unauthorized way, as it might subject him to liabilities and litigation from the shareholders and others; and that the application was necessary, for otherwise the plaintiff might be held liable on the ground of his acquiescing in this use of his name. The Master of the Rolls, Lord Langdale, said, 10 Beav. 562, 563: "The sort of opposition made to the application to prevent the unauthorized use of the plaintiff's name furnishes a specimen of the anxiety of the defendants to avoid unnecessary litigation. I think that the plaintiff is entitled to the injunction. I have no doubt the plaintiff never did consent to be a trustee. The defendant Webster might have thought he did; if he did, his belief rested upon a very slight foundation. However, the name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee; his name was also used at the bankers;

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and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the defendants in using his name. Money was placed in his name at the bankers, and he is left to get rid of his responsibility as he can." And then, after referring to some negotiations for an indemnity which was not given, and the facts, he continues: "I am of opinion that the plaintiff is entitled to the injunction; and, if it subjects the defendants [292] to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not. Is not the plaintiff entitled to be protected against a repetition of those misrepresentations which have already been made? I am willing to believe the statement made on behalf of the defendants, that they do not intend to repeat their misrepresentations; but I think the plaintiff is not bound to rely on their assurance, and that he is entitled to be protected by the order and injunction of this court." Of course there are points of difference between that case and the present; but the injunction was granted on the footing that the plaintiff was exposed to some risk and liability by the unauthorized use of his name. That case was referred to with approval by Lord Cairns in *Prudential Assurance Co.* v. *Knott* (1875) L. R. 10 Ch. 142, 146, an action to restrain a trade libel, in which the court held there was no jurisdiction to restrain the publication of a libel as such, even if it was injurious to property; and Lord Cairns, after referring to the case of *Dixon* v. *Holden* (1869) L. R. 7 Eq. 488, 20 L. T. N. S. 357, 17 Week. Rep. 482, says (1): "It"—that is, *Dixon* v. *Holden*—"professes to proceed mainly upon a case of *Routh* v. *Webster* (1847) 10 Beav. 561, because I observe that the Vice Chancellor says: 'The case of *Routh* v. *Webster* is an authority going the whole length of what is asked here.'" After stating the facts as I have already given them, Lord Cairns continues: "That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the plaintiff might

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have been placed, especially at the time when that case was decided, looking at what was supposed then to be the state of the law as to such undertakings, are obvious; and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name." I may mention in passing a case of *Clark* v. *Freeman* (1848) 11 Beav. 112, 17 L. J. Ch. N. S. 142, 12 Jur. 149, where the court declined to [293] interfere to restrain the sale by the defendant of a quack medicine under the name of "Sir J. Clarke's Consumption Pills," on the ground that it was libel if it was anything, and that there was no injury to the property which was sold. That decision has been frequently the subject of observation by various judges. Lord Cairns, in *Maxwell* v. *Hogg* (1867) L. R. 2 Ch. 307, 311, 36 L. J. Ch. N. S. 433, 16 L. T. N. S. 130, 15 Week. Rep. 467, said that it might have been decided in favor of the plaintiff on the ground that he had a property in his own name. And Lord Selborne, in *In re Rivière's Trademark* (1884) 26 Ch. D. 48, 53, 53 L. J. Ch. N. S. 578, 50 L. T. N. S. 763, 32 Week. Rep. 390, says that *Clark* v. *Freeman, supra,* had seldom been cited but to be disapproved; and Kekewich, J., in a recent case, having in view all that has been said about it, has declined to follow it. The principle is clear enough: the court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability, then, if I rightly understand the law of this court, an injunction is the proper remedy. I will refer to one other case which was cited to me in argument, namely, *Burchell* v. *Wilde* [1900] 1 Ch. 551, 69 L. J. Ch. N. S. 314, 48 Week. Rep. 491, 82 L. T. N. S. 576, 16 Times L. R. 257. In that case the plaintiff and defendant had been in partnership, and there was a dispute as to the right to use the old firm name; and Lindley, M.R., says [1900] 1 Ch. 563: "Apart from some express stipulation, a man has no right to hold out his late partner, or indeed anyone else, as his partner in business, and, if it could be shown that the defendants were holding out the plaintiffs as their partners, I should think (subject to what the defendants, whom we have not heard, might say)

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that the plaintiffs would be entitled to an injunction." At p. 564 Lindley, M.R., says: "As to the good will of the business and the use of the firm name, apart from any liability to which they may be exposing the plaintiffs, the defendants are in the right, and to my mind that liability is so shadowy that the appeal ought to be dismissed." So that, in considering what kind of liability will justify interference, I think the court will be careful to see that [294] the suggested liability was not something merely visionary or shadowy. The partnership act of 1890, § 14, subsec. 1, provides: "Everyone who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made." This really is only a carrying out of a branch of the law turning upon estoppel by conduct. If a man allows his name to be held out to the public as being the person responsible for the transaction in question, he may be held liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorized the act, because he has not taken steps which he should take to stop the unauthorized use of his name. I apprehend that a similar principle would apply in the case of allowing a name to be held out by a man representing himself as agent or as principal in a particular transaction, all forming part, as I have said, of the general principle of estoppel by acts. Now in the present case the defense is chiefly founded on this. "I," said the defendant, "have done nothing that the law has not entitled me to do;" and, taking the single acts and matters complained of, he says, to begin with: "I am entitled to call my cycle 'Times Cycle' or 'the Times Cycle.' I am entitled to adopt for a mark upon it a similar clock to the clock used by the Times newspaper. I am entitled to have the hands of the clock pointing to the same hour." And he is perfectly right in what he says. Again, he says: "I am perfectly entitled to advertise my cycles as 'the Times Cycles' if that is the proper

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name of the cycle. I am entitled to advertise that payment is according to the Times system (meaning the Times newspaper system), the system inaugurated by the proprietors of the Times." So he is, and, thus taking each item one by one, he says: "I am entitled to do this, that, and the other." But the real question I have to consider is whether, by what he has [**295**] done, he has in fact held out the proprietors of the Times as either being principals, or responsibly connected with him, or partners with him in the sale of these cycles. I have come to the conclusion that he has; and I have further come to the conclusion that there was such a reasonable probability of the Times being exposed to litigation, and possibly of being made responsible had they not taken the steps to disconnect their names from the advertisements and circulars that are issued by the defendant, that, although I have hesitated for some time as to whether I ought to do this upon an interlocutory motion, now that the action will come on so quickly for trial when the matter might finally be disposed of upon further evidence still, I think that it is so clear upon the documents and the acts that I have mentioned that this case really falls within the line of authorities commencing with that before Lord Langdale which I cited, that I propose to grant an injunction now in proper form. I may make one other observation. Since the writ was issued, the defendant has put out another advertisement in the Daily Mail, in which he does state fairly conspicuously, though not so conspicuously as I should have wished, that his goods had no connection with any newspaper whatever. That, in my judgment, is not sufficient under the circumstances. I think I ought to grant the injunction in the following form: To restrain the defendant, his managers, servants, and agents, until the trial or further order, from representing that the cycles offered by him for sale are in fact offered for sale by the proprietors of the Times newspaper, or representing that he is carrying on business as a department of, or in connection with, the Times newspaper, or in any way holding out the Times newspaper, or the proprietors thereof, to be the owners of his business. The costs will be costs in the

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action. I think it is only fair, however, that the defendant should have a little time to put things in order.

Solicitors: *Soames, Edwardes, & Jones; Bate & Company.*

Note.—Right of noncompetitor to enjoin one from carrying on his business in such a way as to induce the belief that it is carried on by the plaintiff.

This note is confined to cases where the plaintiff was a noncompetitor of the defendant, and in which the defendant was claimed to be guilty of some act tending to induce the belief that the plaintiff was connected with the defendant's business, thereby subjecting the plaintiff to possible liability. It does not include cases turning upon the question whether or not the article or business of the defendant was in any sense in competition with, or likely to come in competition with, that of the plaintiff.

As to use of tradename or trademark on articles other than those to which it is applied by the owner, see notes to *Virginia Baking Co.* v. *Southern Biscuit Works,* 30 L.R.A.(N.S.) 167, and *Atlas Mfg. Co.* v. *Smith,* 47 L.R.A.(N.S.) 1003.

For a note on "Territorial extent of right in trademark or tradename used in limited locality where used by another in a different locality," see note to *Eastern Outfitting Co.* v. *Manheim,* 35 L.R.A. (N.S.) 251.

Neither does the present note go into decisions as to the right of privacy.

As to right of action for use of photograph or name for advertising purposes, see notes to *Henry* v. *Cherry,* 24 L.R.A.(N.S.) 991, and *Foster-Milburn Co.* v. *Chinn,* 34 L.R.A.(N.S.) 1137.

There is little authority upon the question considered in this note. It would appear, as was held in WALTER v. ASHTON, that a noncompetitor should be entitled to an injunction upon showing that another has falsely represented the complainant as his principal or partner, or as responsibly connected with a venture of such other, and that there is a tangible probability of injury to the property of the plaintiff in consequence of such representations.

The leading case upon the question, prior to WALTER v. ASHTON, was *Routh* v. *Webster* (1847) 10 Beav. 561, which is set out at length by Byrne, J., in the case above reported. In this case an injunction was granted restraining directors of a joint stock company from using complainant's name in a prospectus, stating that he was a trustee of the company.

In a later case, *Dixon* v. *Holden* (1869) L. R. 7 Eq. 488, 20 L. T. N. S. 357, 17 Week. Rep. 482, an injunction was granted re-

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straining a threatened publication of notices that the plaintiff was a member of a bankrupt firm of a name similar to that of the plaintiff. The decision in this case was upon the ground that there was a property right involved, and that the publication would injure the plaintiff in his business.

The two preceding cases and WALTER v. ASHTON were relied upon in *Edison* v. *Edison Polyform & Mfg. Co.* (1907) 73 N. J. Eq. 136, 67 Atl. 392. In this case it appeared that Thomas A. Edison, an inventor of electrical instruments and processes, early in his career, for his own use and that of his assistants, compounded a medical preparation according to a certain formula to relieve neuralgic pains, and that he assigned the formula and right to market the remedy to certain persons, and that after several attempts by the assignees to successfully market the preparation, in the course of assignments it came into the hands of the defendant company, which used the name "Edison" as part of its corporate title; and although it did not hold its goods out as being made by Mr. Edison, it placed labels on bottles containing its preparation which bore his picture and an unauthorized certificate to the effect that the preparation was compounded according to the formula devised and used by him, which in fact was untrue. The court held that the property rights of the complainant were violated, and that an injunction should be granted restraining the defendant from holding out, either in the name of the company or by certificate or pictorial representation, that Mr. Edison had any connection with or part in the company's business, saying: "It is difficult to imagine a case in which preventive relief would be more appropriate than the present. In a perfectly unauthorized way, a certificate falsely purporting to be made by Mr. Edison, and also false in fact because the preparation is not compounded with all the ingredients of the formula, is put, by a company bearing Edison's name, upon every bottle of Polyform which it sells. That there may be no mistake as to who is intended, the certificate is accompanied with a likeness. I think an injunction should be granted restraining the defendant company from holding out, either in the name of the company, or by certificate, or by pictorial representation, that Mr. Edison has any connection with, or part in, the complainant's business. I cannot divorce the company's name from the other parts of the representation. It is, as the evidence stands, part of the fraudulent contrivance."

In *Ford Motor Co.* v. *Wilson* (1915) 223 Fed. 808, it was held that the manufacturer of parts adapted for use in Ford automobiles, though entitled to inform the public of such fact, should be en-

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joined from advertising them as Ford articles, on the ground that such a description would be taken to mean an article manufactured or put out by the Ford Motor Company.

Munn & Co. v. *Americana Co.* (1913) 82 N. J. Eq. 63, 88 Atl. 330, was an action brought by a corporation publishing a periodical, known as the "Scientific American," treating of scientific and industrial subjects, mechanical news, inventions, chemistry, astronomy, engineering news, etc., against other publishing companies which were formed at different times in connection with the publication of an encyclopedia called "The Americana," to enjoin them from using in any manner the name "Scientific American" in connection with the corporate title or with any of their publications. It appeared that there had been a contract between the plaintiff and one of the defendants, authorizing the use of the name "Scientific American Compiling Department," for the purpose of selling the encyclopedia in connection with subscriptions to the complainant's periodical, which contract had come to an end by lapse of time; that as a result of the use of the corporate name "Scientific American Compiling Department" in obtaining the contracts of subscription for the encyclopedia, and the representations of agents securing the same or in connection therewith, many instances had occurred, since the termination of the contract, of confusion in the minds of subscribers or proposed subscribers as to the complainant's being still connected with or co-operating in the publication of the work; that applications to the complainant, arising from this confusion, required attention from them in order to repel or avoid responsibility therefor, either financial or literary; and that in some instances there had been loss of advertising or subscriptions to the "Scientific American" as the result of dissatisfaction with the "Americana." The vice chancellor accordingly held the complainant to be entitled to an injunction. On appeal, ([1914] 83 N. J. Eq. 309, L.R.A. —, —, 91 Atl. 87), however, it was held that the basis of a suit to enjoin the use of complainant's name is the damage or possibility of damage to the complainant, not the damage or probability of damage to the public; that while fraudulent conduct on the part of the defendant is a necessary element, fraudulent conduct without damage to the complainant does not suffice; that as it was not the public, but the complainant, that was to be protected, the conduct of the complainant should be taken into consideration in determining its right to relief, and that as it had been a party to the scheme to present the encyclopedia to the public in such a way as to induce the belief that it was the work of persons connected with the "Scientific

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American," the decree, so far as it enjoined the "Scientific American Compiling Department" from using its corporate name should be reversed; but so far as it enjoined the use of the name "Scientific American" in other ways, it should be affirmed.

In *Kingsley* v. *Jacoby* (1892) 28 Abb. N. C. 451, 20 N. Y. Supp. 46, the proprietors of a hotel known as the Holland House were held entitled to restrain the use of the name "Holland House Banquets" as a name for cigars, the court stating that there was no doubt that the defendant intended to represent to the public that the cigars were in some way connected with the complainant's hotel. This apparently was one of the grounds upon which the injunction was allowed, although the court discussed and apparently relied upon cases involving principles peculiar to tradenames.

In *Von Thodorovich* v. *Franz Joseph Beneficial Asso.* (1907) 154 Fed. 911, an injunction was granted to restrain the use of the name and portrait of Emperor Franz Joseph by a beneficial association in such a way as to induce former subjects of the Emperor to believe that the association was under the latter's special patronage and concern, and thus work a fraud on them. It was not suggested in this case that the acts complained of might attach any responsibility to the Emperor, or induce a belief that the business was carried on by him, and the case is not therefore directly in point in this note.

In *Edison* v. *Thomas A. Edison, Jr., Chemical Co.* (1904) 128 Fed. 957, an injunction was sought by Thomas A. Edison, the inventor, against a company called the Thomas A. Edison, Jr., Chemical Company, of which the son of the inventor was originally a member, to restrain the use of the name "Edison" and word "Wizard" in connection with certain ink tablets and an electric vitalizer not invented by the complainant. The bill proceeded on the assumption that the value of the complainant's inventions rested largely upon his wide reputation as a successful inventor, and that any fraudulent practices by the defendant causing the public to believe that worthless or inferior articles were sold by the complainant not only worked a fraud on the public, but injuriously affected the complainant's reputation and income. The court denied the complainant an injunction, saying: "Putting the case made by the bill and demurrer in the most favorable light for the complainant, and disregarding the objections above discussed, it amounts in principle to this, *viz.*, that the defendant, by advertisements or otherwise, knowingly and falsely informs the public to the detriment of the business reputation of the complainant and consequent impairment of his income, that the

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Magno-Electric Vitalizer, and ink tablets, in which the defendant deals, are of the manufacture of the complainant, notwithstanding the fact that the latter is in no way connected with the manufacture or sale of such articles or devices. But the bill does not charge the defendant with menace, intimidation, or coercion of any kind toward customers of the complainant, or with any direct attack upon his property or conduct of his business; nor does it allege that the acts complained of have created, or if repeated will create, any liability on the part of the complainant to third persons. Further, the case as presented is, indeed, one only of constructive, indirect, or implied libel or defamation by the defendant of the business reputation of the complainant and consequent diminution of his income. To hold that on the facts admitted by the demurrer the complainant is entitled to the relief he prays would establish a dangerous precedent, calculated to produce confusion in the business world, open wide a door to fraud, and result in much greater evil to the public than that suffered by the victims of the defamation."

In *Simplex Automobile Co.* v. *Kahnweiler* (1914) 162 App. Div. 480, 147 N. Y. Supp. 617, it was held that the plaintiff, whose sole business was the manufacture and sale of automobiles, and who had for many years used the word "Simplex," written in a particular manner, as a tradename and device, was not entitled to enjoin the defendant from using the same word, written in the same manner, upon fire extinguishers manufactured by the defendant, on the ground that under the circumstances there was no trade competition or deception of the public. No contention seems to have been made in this case that the use of the device in question might lead the public to suppose the fire extinguisher to be a product of the automobile company.

So, also in *Astor* v. *West 82d Street Realty Co.* (1915) 167 App. Div. 273, 152 N. Y. Supp. 631, it was held that money damages must be shown in order to establish a right to equitable relief. In this case the owner of an apartment house called "The Apthorp," the apartments in which consisted of not less than six or more than twelve rooms, and were rented under leases for not less than one year, and at rentals of from $1,800 to $6,500 a year, in which there was no public dining room and no room service furnished, was held not entitled to enjoin the use of the same name by a hotel, on the ground of inconvenience suffered by plaintiff's tenants, guests, and the public, arising from the identity of name, the court saying: "plaintiff's right, at most, is to restrain others from using the name 'Apthorp' in connection with any apartment house, or the letting of apartments, under such circumstances as are calculated to induce

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the public to believe that their building or apartments are those of the plaintiff. The situation must . . . be one which discloses that competition exists; for without competition there can be no unfair competition, and hence no invasion of any equitable right."

In *Clark* v. *Freeman* (1848) 11 Beav. 112, 17 L. J. Ch. N. S. 142, 12 Jur. 149, a noted medical man was refused an injunction to restrain a chemist from selling pills or other medicines under the complainant's name and under the false representation that they were sold on behalf of or under the sanction or approbation of the complainant. The court stated that it could interfere in cases of mischief being done to property by the fraudulent misuse of a person's name by another, but pointed out that the complainant was not in the habit of manufacturing and selling pills and such remedies as the defendant sold.

This case, as shown by the opinion in WALTER v. ASHTON, has received much unfavorable criticism.

A case somewhat analagous has been decided the other way in the United States. In *Mackenzie* v. *Soden Mineral Springs Co.* (1891) 27 Abb. N. C. 402, 18 N. Y. Supp. 240, an injunction was granted against the unauthorized publication by a company of alleged letters in the name of a physician, who was a throat specialist, recommending a certain medical preparation of the company, the ground of the decision in the case being that the publication was calculated to damage the complainant in his professional standing and name. There appears to have been nothing which would induce the belief that the company's business was being carried on by the complainant in this case, and it is therefore not strictly within the scope of this note.

In another case, not strictly in point, since there was no representation by the defendant that its business was carried on by the complainant, it was held that a telegraph company was not entitled to restrain the use of a simulation of its envelop with the word "telegram" printed thereon, by a company manufacturing advertising specialties, which made use of the envelop for the purpose of drawing attention to its contents for securing from the addressee immediate attention thereto, since the telegraph company was not thereby affected in any of its property rights, and it being necessary in such a case for the complainant to establish some actual or probable injury to its property rights. *Postal Teleg.-Cable Co.* v. *Livermore & K. Co.* (1911) 188 Fed. 696. J. T. W.

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[SUPREME COURT OF CANADA.]

JENNIE HUTCHINGS (*Plaintiff*), *Appellant*, and THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA (*Defendants*), *Respondents*.

37 Can. S. C. 124.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance — Condition of policy — Premium note — Payment of premium.

Evidence that at the time a renewal premium on a policy of life insurance became due the assured gave the local agent of the insurance company, to whom, under a provision of the policy, premiums might be paid, a 60-day note for the amount of the premium and interest thereon, which the agent caused to be discounted, placing the proceeds to his own credit in his bank account, without, however, countersigning or delivering the renewal receipt in his hands or remitting the amount of the premium to the company, but attaching the receipt to the note; that when this note became due it was not paid by the assured, but was renewed for a smaller sum, the agent paying the difference to the bank together with the discount on the renewal; that upon its maturity a second renewal note was given, during the currency of which the assured died, and which at its maturity was taken up by the agent,—does not warrant the jury in finding that the premium had been paid in cash to the company at the time when the local agent discounted the first note and received the proceeds.

(December 22, 1905.)

Present: Sir Elzéar Taschereau, Ch.J., and Girouard, Davies, Idington, and Maclennan, JJ.

APPEAL from the judgment of the Supreme Court of Nova Scotia, 38 N. S. 15, which set aside the judgment [125] entered upon the findings of the jury and dismissed the plaintiff's action, with costs.

The action was brought by the beneficiary under a policy of life assurance, and the only question raised upon the pleadings and to be tried was whether or not the renewal premium was paid in cash to the company's agent when it became due. The renewal premium was payable on the 15th of October, 1902.

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*[The assured was unable to pay this premium, and a note was taken by the agent, A. E. Harrington, for the amount of the premium, with 75 cents for discount. The note was made in favor of "A. E. Harrington, Agent," and was shortly afterwards discounted by him, and the proceeds paid to his private account with the discounting bankers. The receipt for the premium was not handed over, but was attached to the note given to cover the premium, and, if the note had been retired at maturity, the receipt would have been handed over to the assured. When this note became due, sixty days after that date, it was not paid by the assured, but was renewed for $40, the agent paying out of his private funds the difference between the old and the new note, together with the discount on the renewal, no part of which has ever been paid by the assured. This renewal note for $40 became due about January 17, 1903. The agent then told the assured that he would have to send the receipt back at the end of the month (of January) or have it paid; that he would renew this $40 note at sixty days, so as to give him time, if he would pay the difference on the previous note of ten or eleven dollars, to which the assured replied that he did not see how he could manage it at all, that he was so fearfully hard up. Harrington then said that the $40 note would have to come out anyhow as it was then overdue a couple of days. "Give me this renewal, and when I have to send the receipt back I will see you first. If you cannot take out the $30 note I will treat it as an accommodation to myself and pay it when it falls due." To this, Hutchings, the assured, agreed, and, in accordance with his promise, the agent, Harrington, before sending in his report and returning to the head office the company's receipt for the premium, gave the assured a last opportunity to save his policy. The report had to be sent in about the 1st of February, and, shortly before transmitting it, Harrington saw Hutchings and endeavored to get the matter arranged. He offered to take security and pay the premium for him. Proposed that Hutchings should sell him his horse and have the use of it, nevertheless, and Harrington would keep the policy alive by payment of the premium. Unfor-

*This statement of facts, taken from the opinion of Russell, J., in 38 N. S. 18, is substituted for that given in the Canada Supreme Court Reports, as being more explicit.—Ed. B. R. C.

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tunately, the horse could not be made available as it was under bill of sale. At the beginning of this conversation, Hutchings had said that he could not pay the difference on the note, and would have to let the policy go, and Harrington, finding no means available to avert this result, said that there was nothing for him to do but to send the receipt back, to which Hutchings replied that he was very sorry, and if his business looked up a bit in the summer he would revive the policy. This occurred about the 1st of February. The note for $30 was then in the bank about to become due, and the receipt for the premium was on the 3d of February returned to the head office with a letter from Harrington, saying: "I regret having to return renewal receipt 1865 (Hutchings), but this party is in difficulties and could not pay the note I took from him, but says he will revive the policy when business looks up in the summer." On March 12th Hutchings died, and on March 23d the second renewal note fell due and was retired by Harrington. Shortly afterwards, on the same day, the solicitor of the plaintiff called at the bankers with the money to pay the $30 note, when he learned that it had already been paid.]

At the trial the jury found that the premium had been paid in cash to the company at the time when the local agent discounted the first note and received the proceeds, and, upon this finding, judgment was entered in favor of the plaintiff. The judgment now appealed from set aside the verdict as being against the evidence, and dismissed the plaintiff's action, with costs.

[126] **Mellish**, K.C., for the appellant. We submit that the findings of the jury and the judgment thereon should be restored, or in the alternative a new trial ordered. Under the facts the jury could have come to no other conclusion than that the premium was paid in cash to the company's agent. It was received to be discounted, and the discount charge was added to the face of the note; the agent used the note for the purpose for which it was given, not to pay the premium with the note, but to get the money in payment of the premium by discounting the note. The agent got the money in that way and held it for his company, but subsequently changed his mind, as he found he had made a mistake in lending his own credit to the assured who

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was in financial difficulties. The note was not payable till sixty days after its date (15th October, 1902). The agent was not authorized to take a note in payment of the premium, and the policy would have been avoided thirty days after that date (the grace allowed), and the assured could not have revived it even by paying the note at maturity. See opinions by Sir Henry Strong in *London and Lancashire Life Assurance Co.* v. *Fleming* [1897] A. C. 499, 66 L. J. P. C. N. S. 116, in the Privy Council, and by Burton and Osler and Maclennan, JJ., in the same case in the Court of Appeal for Ontario, 23 Ont. App. Rep. 666, at pages 670–673; also by Meredith, Ch. J., in the report of the judgment of the trial court, 27 Ont. Rep. 477; which clearly indicate that if such an agreement as that referred to had been proved, and the notes discounted, as they were by this agent, it would have amounted to a payment of the premium in cash. The condition and the stipulation in the application for insurance, made part of the contract, that if any note [127] given for a premium be not paid when due the policy will not be in force, refers only to such notes made directly to the company. See also *The Manufacturers' Accident Ins. Co.* v. *Pudsey* (1897) 27 Can. S. C. 374.

W. B. A. Ritchie, K.C., for the respondents. There was no evidence whatever of payment of the premium, and the learned trial judge should have withdrawn the case from the jury, as requested by counsel at the trial on the conclusion of the plaintiff's case. It was for the judge, alone, to decide whether or not any facts had been established by evidence, from which payment of the premium might be reasonably inferred; and if such facts had not been established by evidence then it was his duty to have withdrawn the case from the jury. *Metropolitan Railway Co.* v. *Jackson* (1877) 3 App. Cas. 193, per Cairns, L.J., at page 197, 47 L. J. C. P. N. S. 303, 37 L. T. N. S. 679, 26 Week. Rep. 175, 18 Eng. Rul. Cas. 677; *Ryder* v. *Wombwell* (1868) L. R. 4 Ex. 32, per Willis, J., at page 38, 38 L. J. Exch. N. S. 8, 19 L. T. N. S. 491, 17 Week. Rep. 167; *Bridges* v. *North London Railway Co.* (1873) L. R. 7 H. L. 213, per Pollock, B., at page 221. We also rely on *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (1878) 3 App. Cas. 1155, 39 L. T. N. S. 365,

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27 Week. Rep. 191, and particularly the observations of Lord Penzance in 3 App. Cas. at page 1175, Lord O'Hagan at pages 1181, 1182, and of Lord Coleridge, pages 1195–1197.

The fact that the renewal receipt had not been countersigned, as required by its conditions, is a fact strongly demonstrating that the premium had not been considered as having been paid. Moreover, it never reached the possession of assured. *Confederation Life Association* v. *O'Donnell* (1882) 10 Can. S. C. 92; *Busteed* v. *West England Fire and Life Ins. Co.* (1856) 5 Ir. Ch. Rep. 553; Bunyon on Life Assurance (3d ed.) p. 83; *London and Lancashire* [128] *Life Assurance Co.* v. *Fleming* [1897] A. C. 499, 66 L. J. P. C. N. S. 116; *Torrop* v. *Imperial Fire Ins. Co.* (1896) 26 Can. S. C. 585.

The proceeds of the note were held by the agent merely as agent for assured. If he had agreed to apply these funds to the payment of the premium, he never so applied them. The money was paid into his bank account as the agent of Hutchings to pay the premium, and he never did pay the premium. He never paid out the money as instructed by his principal, but kept it in his personal account and used it for his own purposes. If assured gave the note to him as agent of the company, his act, in taking the note, was not binding on the company, because it was beyond his authority as defined by the policy to take such a note.

It is submitted that the agent held the money as agent for Hutchings until the maturity of the note, when, if Hutchings paid it, he got the renewal receipt and the agent was to pay the company. This is shown by the renewal receipt being attached to the note. Later on when it became evident that Hutchings could not pay the renewal note and repay the sum advanced by the agent on renewing it, it was agreed that the agent should treat the paper as for his own accommodation, to which Hutchings agreed.

The respondent relies on the following authorities: *Acey* v. *Fernie* (1840) 7 Mees. & W. 151, 10 L. J. Exch. N. S. 9, approved by the Privy Council in *London and Lancashire Life Assurance Co.* v. *Fleming* [1897] A. C. 499, 66 L. J. P. C. N. S. 116; *Bartlett* v. *Pentland* (1830) 10 Barn. & C. 760, 8 L. J.

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K. B. 264; *Baines* v. *Ewing* (1866) L. R. 1 Ex. 320, 4 Hurlst. & C. 511, 35 L. J. Exch. N. S. 194, 14 L. T. N. S. 733, 14 Week. Rep. 732; Brice on Ultra Vires (3d ed.) p. 658; *Giblin* v. *McMullen* (1868) L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445; *Hiddle* v. *National Fire and Marine* [129] *Ins. Co. of New Zealand* [1896] A. C. 372, 65 L. J. P. C. N. S. 24, 74 L. T. N. S. 204, 15 Eng. Rul. Cas. 64; *Hine Bros.* v. *Steamship Insurance Syndicate* (1895) 72 L. T. N. S. 79, 11 Reports, 777, 7 Asp. Mar. L. Cas. 558; *Phillips* v. *Mayer* (1857) 7 Cal. 81.

The fact of there being an express condition in the policy, limiting the authority of the agent, was notice to the assured that the agent was not possessed of power to take a renewal note. It was not, therefore, within his apparent authority, as it appeared otherwise from the policy. *Frank* v. *Sun Life Assur. Co.* (1894) 23 Can. S. C. 152 note, 20 Ont. App. Rep. 564; *McGeachie* v. *North American Life Ins. Co.* (1893) 23 Can. S. C. 148.

The **Chief Justice** and **Girouard**, J., concurred in the judgment dismissing the appeal, with costs.

Davies, J. (dissenting): My mind fluctuated a good deal during the course of the argument before us, but a careful reading of the evidence and judgments appealed from, and further consideration of the arguments of counsel, have convinced me that there was sufficient evidence before the jury to enable them to find a payment in cash of the premium by the assured to the agent of the company. The agent held in his hands at the time the renewal receipt duly signed by the company's proper officers.

There is no term of the policy requiring this receipt to be countersigned or delivered by the agent. It merely requires, to enable the agent to receive payment, that he should have in his possession the receipt signed by the president, managing director, and secretary of the company, or any two of them. On

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this evidence there was a finding in favor of the plaintiff, and on that finding the trial judge directed judgment to be entered for her.

[130] The question is one purely of fact. Both parties rely upon the case of *London and Lancashire Life Assur. Co.* v. *Fleming* [1897] A. C. 499, 66 L. J. C. P. N. S. 116. Applying the principles of law determined in that case to the facts proved in this, the question is reduced entirely to one of fact: Did or did not Harrington receive the premium in cash? And the proper tribunal to determine it, once there was evidence to submit to them, was the jury.

On the 15th day of October, 1902, the agent of the company, Mr. Arthur E. Harrington, went to the insured and arranged with him to raise the money by a note which Harrington was to discount. The premium was $49.27, and the note was for $50.27,—the difference being to pay the charge of discounting. Harrington discounted the note with the bank and got the proceeds, $49.27, to remit to the company, but failed to remit, as he heard very shortly after taking the note that the assured was in financial difficulties. The note was payable sixty days after date.

It was argued that because Harrington had the proceeds of the note put to his credit in his account in the bank where he discounted the note, that, in some way or another, he could not be said to have received it in cash.

I am unable to appreciate or accept that argument, or to discern the substantial difference between Hutchings taking the note, having it discounted, and handing over the proceeds to Harrington, or the latter discounting it and putting the cash to his own credit. In either case he would have received the cash.

It matters not what Harrington did with the cash after he received it, or how long afterwards he heard assured was in financial difficulties and determined [131] upon protecting himself by retaining the money he had received as the proceeds of the note.

All the subsequent acts and conversations of the agent and the assured may have been good evidence to throw light upon what was the real transaction at the time of the discount of the note.

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But it was all admitted and went to the jury, and the finding of the jury, which in my opinion was justified, should not be disturbed.

I would allow the appeal, with costs.

Idington, J.: This case is clearly distinguishable from that of the *Manufacturers' Accident Ins. Co.* v. *Pudsey* (1897) 27 Can. S. C. 374, upon which appellant relies. There the renewal receipt, which was a badge of authority in the hands of the agent, was found by the jury to have been delivered over to the assured upon his payment of part of the premium and giving his note for the balance, and the court held correctly that there was evidence to go to the jury on that and other points in dispute.

The failure of the assured here to get the receipt for the premium, or perhaps even to have seen it, and the peculiar circumstances connected with the retention of it by the agent, tell against the assured having relied upon the agent having authority, or the company by any act of theirs inducing him to rely on the authority of the agent for doing as he did.

The principles upon which the decision in the case of *London & Lancashire Life Assurance Co.* v. *Fleming* [1897] A. C. 499, 66 L. J. C. P. N. S. 116, rests are decisively against the case of the appellant here.

I think, therefore, that the appeal ought to be dismissed, with costs.

[132] **Maclennan, J.** (dissenting): I am of opinion that this appeal should be allowed, and that the judgment at the trial should be restored.

The life policy sued on provides that the premiums, after the first, shall be paid at the head office of the company. But by a privilege or proviso indorsed upon the policy and made part thereof, it is declared that premiums may be paid to any officer or agent who has in his possession a printed receipt therefor issued by the company and signed by the president, managing director, and secretary, or any two of them. Such a receipt duly signed in accordance with that privilege or proviso was in the

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hands of the agent of the company, Mr. A. E. Harrington, at the time of the transactions between him and the deceased which are in question.

I think, in the first place, it is clear that if the assured had paid the premium to Harrington that was all he was required to do. It was not necessary that Harrington should deliver the receipt to him, or that he should request or demand that to be done. The payment of the money was the essential and only thing required to be done, and the sole question is whether or not the assured did in fact pay his premium to Harrington.

What took place was this: The premium, $49.27, was due on the 15th of October, 1902, and the assured had not the money, so the company's agent, Mr. Harrington, took a note at sixty days for the sum of $50.27, the excess over the amount of the premium being for the discount charged by the bank. Mr. Harrington says that he discounted the note, and the proceeds, $49.27, were placed to his credit, and that he had, at that time, in his possession the company's receipt [133] duly signed according to the privilege or proviso.

I think the effect of that transaction was a payment by the assured to the company's agent of the premium on his policy; that is, a payment in money according to the terms of the policy.

It appears that Harrington did not send the money to the company, nor did he deliver the receipt to the assured, but attached it to the note. I think that makes no difference, and that the premium was paid according to the terms of the policy.

I think the appeal should be allowed, with costs.

Appeal dismissed, with costs.

Solicitor for the appellant: *Henry C. Borden.*

Solicitor for the respondents: *A. Cluney.*

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Note.—Promissory note as payment of insurance premium.

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I. Scope.

The purpose of this note is to deal with the various questions which arise out of the situation created by the giving of a promissory note for an insurance premium, either by the insured or by a third person, in lieu of a cash payment; including the operation and effect of stipulations, made as a condition of its acceptance, suspending or forfeiting the insurance should the note not be duly paid at maturity. It does not, however, include cases as to the effect of an extension of credit generally for the payment of premiums; cases which turn on the question whether it is within the corporate power of an insurance company to take notes for premiums; cases relating to notes given by the insured to the insurer for other purposes, such as deposit notes given by members of mutual insurance associations to secure payment of assessments; nor cases in which the contract contemplates the giving of a note for a portion of the stipulated premium, bearing interest from time to time, but not becoming due and payable until a final settlement, such transaction being in effect a loan to the insured secured upon the proceeds of the policy. (See *Northwestern Mut. L. Ins. Co.* v. *Little* (1877) 56 Ind. 504, it is said that premium notes "are not, strictly speaking, promissory notes. They are not payable at any definite time or in the usual way. They afford evidence simply that portions of certain annual premiums on the policy have been loaned or advanced to the assured to be repaid by dividends or, on the death of [the insured], out of the proceeds of the policy.") It does not include cases as to the effect as a payment of the initial premium, of the execution of a note which was never delivered, so as to put the insurance in force; nor cases involving the question whether acceptance of a promissory note for one premium will justify the inference by the assured that a similar indulgence will be granted as to other premiums. Nor does it include cases which turn on the question of the authority of the agent of the insurer to accept a note in lieu of the cash premium, or to waive a forfeiture arising out of a default in payment; but, starting with the assumption that the insurer is bound by the transaction, either by virtue of authority previously given or by a subsequent ratification,

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considers its effect upon the rights of the insurer, the insured, the beneficiary, or an assignee of the policy.

It is hardly necessary to add, except by way of caution to the over-sanguine seeker for information, that the scope of this discussion does not extend to cases arising out of the enforcement of such notes; nor cases which deal with the question as to whether a paid-up policy of life insurance is affected by failure to keep up payment of interest on outstanding notes.

As to power of agents to bind insurer by oral waiver or estoppel *in pais* as to forfeiture occurring after issuance of policy and before loss under policies of insurance requiring consent or waiver to be in writing, see note in 10 L.R.A.(N.S.) 1064.

For annotation of the general question of "waiver of stipulation that policy shall not become binding unless delivered to assured while in good health," see note in 43 L.R.A.(N.S.) 727, and 17 L.R.A. (N.S.) 1149.

II. As payment in general.

a. Generally.

It is familiar law that a note given for a precedent debt will not, in the absence of an agreement, express or implied, to that effect, operate as an extinguishment of the debt, but merely as an extension of the time of payment. Accordingly, unless the obligation created by the note is accepted by the insurer in lieu of that created by the policy, the rights of the respective parties as defined by the policy remain *in statu quo* during the currency of the note, except so far as the fact of the taking of the note operates as a waiver of the stipulations of the policy, or such rights are varied by the contract of the parties as contained in a provision of the policy covering such a contingency, or in the note itself.

As to whether the acceptance of a note for a premium, which is not paid at maturity, waives the right to declare the policy forfeited or suspended for nonpayment of premiums, see III., post.

Where a policy silent as to the mode of payment was delivered with a receipt for the first year's premium attached, countersigned by the company's agent, who accepted the notes of the insured for part of it, the company must, in judgment of law, be deemed to have accepted the notes in payment of the premium, even in the absence of any express agreement to that effect. *Union Cent. L. Ins. Co.* v. *Taggart* (1893) 55 Minn. 95, 43 Am. St. Rep. 474, 56 N. W. 579.

The giving of a negotiable note for the amount of an initial premium, payable at a certain time six months distant and probably at a date much later than that upon which a policy would be issued in the ordinary course of business, is, where not explained by any

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testimony on the part of the insurer, evidence of the payment of the premium. *Francis* v. *Mutual L. Ins. Co.* (1910) 55 Or. 280, 106 Pac. 323.

Evidence of the payment of a sum of money, and the giving of a negotiable note for the balance of the premium, and the retention of the note by the insurer after its nonpayment at maturity, will warrant an inference that the transaction amounted to a payment of the premium. *Manufacturers' Acci. Ins. Co.* v. *Pudsey* (1897) 27 Can. S. C. 374.

An agreement on the part of the insurer, before the premium became due, to accept a note for three fourths of the amount of the premium and give time for the payment for the remaining fourth, is for a good consideration, and is effectual to keep the policy in life. *Dean* v. *Ætna L. Ins. Co.* (1875) 62 N. Y. 642.

The fact that part of an insurance premium has been paid by a note which is overdue and unpaid at the time of the loss does not avoid the policy, but the amount due on the note should be deducted from the amount of the insurance. *The Natchez* (1890) 42 Fed. 169.

In *New York L. Ins. Co.* v. *Pike* (1911) 51 Colo. 238, 117 Pac. 899, it appeared that the agents of the insurer were authorized to accept notes in payment of initial premiums, and that it was the invariable custom when such notes were taken and the applications accepted to issue the policies, send them to the insured through the soliciting agent, and look to such agent for the premium. In the case under consideration the insured, upon being solicited to take out the policy, was averse to doing so, stating as a reason that he did not have the money with which to pay the premium; and was informed that he could give his note for the first annual premium, as the company sometimes did business in that way; thereupon he signed an application, and signed and delivered to the soliciting agent a note for the first annual premium, payable to the soliciting agent; his application was accepted, and the policy issued from the home office and sent to a general agent. As the soliciting agent was behindhand in the payment of other premiums, the policy was sent by the general agent to a bank, with instructions to return it if the first instalment of the note should not be paid when due. The application contained no provision that any premium must be paid before the policy took effect, or that the policy must actually come into the hands of the insured in his lifetime. The insured died before the note became due. Under these circumstances it was held that as the application was to be taken as having been made with reference to the invariable custom above stated, the mailing the policy from the home office of the company amounted to a delivery to the insured.

Though payment of the premium may be a condition necessary

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to the operation of the policy, yet where the notes of a solvent third party are accepted in payment of such premium, the policy cannot thereafter be avoided because such notes are not paid. *Home F. Ins. Co.* v. *Stancell* (1910) 94 Ark. 578, 127 S. W. 966.

An application for reinstatement after failure to pay a note given for a premium shows that the note was not understood by the parties to operate as a payment of the premium. *Hayes* v. *New York L. Ins. Co.* (1910) 68 Misc. 558, 124 N. Y. Supp. 792 (affirmed without opinion in 150 App. Div. 927, 135 N. Y. Supp. 1116, which is affirmed in 211 N. Y. 9, 104 N. E. 1122).

In *Bell* v. *Hudson Bay Ins. Co.* (1911) 44 Can. S. C. 419, it was held that the acceptance by the insured of a draft for the amount of a premium was equivalent to a payment thereof, so as to put the insurance in force notwithstanding a clause in the application that if the premium should not be paid as agreed the insurance should be void until "such settlement is made," although the draft remained due and unpaid at the time of the loss.

The acceptance of a note "as payment of the assessment" by a mutual insurance company is not an abandonment of the right to have the policy avoided under the statutory provision that if an assessment be not paid within thirty days the policy shall be null and void as respects all claims for losses occurring during the time of such nonpayment,—in the event of the promissory note not being actually paid at maturity. *McGugan* v. *Manufacturers' & M. Mut. F. Ins. Co.* (1879) 29 U. C. C. P. 494.

The fact that a note taken for a premium provides for interest is significant to show that it was taken by the insurer in payment of the premium. *Arnold* v. *Empire Mut. Annuity & L. Ins. Co.* (1907) 3 Ga. App. 685, 60 S. E. 470. But a contention that a note for an insurance premium was taken as payment because it was made payable with interest, thus imposing an additional burden on the assured, cannot succeed where the note itself contains a stipulation that if it is not paid at maturity the policy shall forthwith become null and void, subject, however, to the privilege of reinstatement. *Wood* v. *Confederation L. Ins. Co.* (1901) 2 N. B. Eq. Rep. 217.

The execution of a note for the amount of a premium does not amount to a payment thereof where the note contains a condition that if not paid at maturity the policy shall be void, and the note has not in fact been paid. *Manhattan L. Ins. Co.* v. *Myers* (1900) 109 Ky. 372, 59 S. W. 30.

Such a note shows that it was not accepted as a payment of the premium, but constitutes merely an extension of the time of payment. *Sexton* v. *Greensboro L. Ins. Co.* (1911) 157 N. C. 142, 72 S. E. 863, s. c. on subsequent appeal 160 N. C. 597, 76 S. E. 535; *Union*

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Cent. L. Ins. Co. v. *Whetzel* (1902) 29 Ind. App. 658, 65 N. E. 15.

Where a forfeiture for the nonpayment of premium notes is provided for either in the policy or the note, and the facts do not show any subsequent agreement or conduct which amounts to a waiver of such provision by the insurer, the giving of the note must be regarded as merely postponing the time for the payment, and not as a payment of the premium. *Occidental L. Ins. Co.* v. *Jacobson* (1914) 15 Ariz. 242, 137 Pac. 869.

The extension of the time of payment of a premium by a note which expressly provides that the policy is extended "until default is made in payment of this note, and all rights and benefits secured thereby shall cease and determine without notice, and said policy shall be *ipso facto* null and void," does not do away with the provision of the policy that unless premiums are paid when due the policy shall cease and determine. *Citizens' Nat. L. Ins. Co.* v. *Morris* (1912) 104 Ark. 288, 148 S. W. 1019.

Where the receipt of a note operates as payment of an insurance premium, evidence of an oral agreement between the agents and the insured to the effect that if the note should not be paid at maturity the insured would return the policy is not competent in an action on the policy, as tending to vary a written instrument. *Clarke* v. *Home Fund L. Ins. Co.* (1907) 79 S. C. 494, 61 S. E. 80.

A parol agreement that a note given for a premium is accepted as an absolute payment, when it is stipulated in the policy that "such note shall be accepted as payment thereof only until maturity of such note, and if the same be not paid at maturity according to its terms this policy shall be void, so long as the same remains unpaid," is contradictory of the written agreement and is void. *Continental Ins. Co.* v. *Dorman* (1890) 125 Ind. 189, 25 N. E. 213.

And a parol agreement of the insurer made on receiving a promissory note for a premium, that the policy should not become void on the nonpayment of the note at maturity, which is in direct contravention to the express terms of the policy and the note itself, cannot affect them, but is itself void. *Thompson* v. *Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765.

Where a note has been given for a premium, an insurer seeking to exercise its right reserved by a condition in the policy to terminate the insurance at any time on giving notice, and, in case the premium has been paid, tendering back the unearned proportion thereof, is not bound to tender back cash for the unearned premium but may credit the proper amount on the note. *Little* v. *Eureka F. & M. Ins. Co.* (1882) 38 Ohio St. 110.

A volunteer who obtains insurance on the life of another for the benefit of a third person, giving his own note for the premium, is

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under no obligation to the beneficiary to pay such note at its maturity; nor is the insurer under any obligation to the beneficiary to enforce it; although by the terms of the policy it lapses in case of nonpayment of such a note. *Timayenis* v. *Union Mut. L. Ins. Co.* (1884) 22 Blatchf. 405, 21 Fed. 223.

In *Citizens' L. Ins. Co.* v. *Coleman* (1912) 148 Ky. 750, 147 S. W. 414, the agent soliciting the insurance gave to the applicant a receipt reading, "Received of Howard D. Coleman one note for $36.60 in full for the first annual premium on $2,500 insurance. The insurance will be in force from the date of approval of the application by the medical director." The receipt did not show when this note matured or was payable, but it appears elsewhere in the report that it was payable on delivery of the policy. When the policy was tendered the applicant was unable to pay, and the agent said to him that he could probably fix it without the payment of the money if the applicant would execute a new note for the amount of the premium. Thereupon the applicant proposed to execute a note payable in six months, when the agent said he did not know whether the company would accept a six months' note or not, but he would take the note and send it to the company, and if it was accepted by the company he would deliver him the policy. In reply to the letter of the agent advising them of the situation and inclosing the six months' note, the company replied that "before we can accept this note it will be necessary for Mr. Coleman to submit to an examination, and we inclose herewith health certificate in blank form for the doctor." The agent informed the applicant of this letter, but, within ten days thereafter and before submitting to the re-examination, the applicant was killed in a railroad accident. Under these circumstances it was held that a stipulation in the policy that "if any note or other obligation given for the first year's premium or any part thereof on this policy shall not be paid when due this policy contract shall be and become null and void without any notice or action of the company, notwithstanding any receipt which may have been given for such premium" had no application, the policy never having been delivered, but that the contract of insurance was that contained in the receipt; that the effect of such receipt was to insure the applicant between the acceptance of the application by the medical director of the company and a tender to him of a policy in compliance with the terms of the application; that while the company upon tendering the policy and demanding payment of the premium note had the right then and there, upon the failure or refusal of the applicant to perform his part of the contract by paying the note, to deliver to him his note and elect to declare the contract for insurance at an end, it also had the right to prolong the life of the policy, and did so by retaining the note executed when the appli-

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cation was made, by failing to inform the applicant that the contract was canceled, and by receiving from him a new note for the amount of the premium, although this last-mentioned note was not at that time accepted by it in satisfaction of the premium; that by this course of dealing the company reasonably led the applicant to believe that all he had to do to continue the life of the policy for one year was to submit to a re-examination; and that as the time within which this re-examination should take place was not agreed upon, and as it could not be said that the applicant had delayed having the examination for an unreasonable length of time after being informed that it was necessary, the contract of insurance created by the receipt continued in force up to the time of his death.

b. As satisfying requirement that initial premium must have been actually paid.

It has been held that the condition of a policy that it shall not take effect until the first premium is paid in cash is not fulfilled by the giving of a note. *Mutual Reserve Fund Life Asso.* v. *Stephens* (1902) 115 Ga. 192, 41 S. E. 679.

And that the payment of premiums in advance, as required by the policy, is not established by showing the execution of promissory notes containing the condition that if not paid at maturity the policy shall be void. *Manhattan L. Ins. Co.* v. *Myers* (1900) 109 Ky. 372, 59 S. W. 30.

But in *Ellis* v. *Anderson* (1912) 49 Pa. Super. Ct. 245, it was held that the acceptance by the insurer of an interest-bearing note for a premium was a waiver of a provision of the policy requiring premiums to be paid in advance,—especially as the policy in stating the amount payable on the death of the insured as "less the unpaid balance of the current year's premium, if any," clearly indicated that it was in the contemplation of the parties that the policy might still be in full force even though the current year's premium had not been fully paid.

Where by the terms of a policy it was not to become operative or binding until the actual payment of the initial premium, and the assured gave a promissory note for the amount of the initial premium, receiving in exchange a receipt, which stated that, in order to make it valid, "the amount specified herein must be actually paid, otherwise this receipt and said policy shall be null and void. It is understood and agreed that a protested check or past-due note or obligation given in exchange for this receipt, when dishonored or not paid at maturity, shall render this receipt and said policy absolutely void," the nonpayment of the note at maturity avoids the policy. *Satterfield* v. *Fidelity Mut. L. Ins. Co.* (1911) 171 Ala. 429, 55 So. 200.

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In *New York L. Ins. Co.* v. *Evans* (1910) 136 Ky. 391, 124 S. W. 376, it is said that it was once thought, and sometimes held, that the note did not waive the stipulation for cash payment—that the insured carried the risk of dying uninsured until the premium note was paid in cash; but that that view was early abandoned, and it is now universally held that the acceptance by the insurer of the note is a waiver of the policy provision for cash payment of the particular premium in advance.

The requirement of "actual payment" in the policy does not exclude all other methods of payment which are not made in cash. The premium may be paid by the credit of assured, if so accepted. *Penn Mut. L. Ins. Co.* v. *Norcross* (1904) 163 Ind. 379, 72 N. E. 132.

The acceptance of notes is equivalent to the payment of the premium to satisfy a provision of the policy that it shall not be in force until the premium is paid. *Mutual L. Ins. Co.* v. *Allen* (1903) 113 Ill. App. 89 (affirmed in 212 Ill. 134, 72 N. E. 200, where it was held that in view of the facts the court could not say, as matter of law, that there had been no payment of premium on the policy).

So, an insurer accepting a note in payment of the initial premium and issuing a policy is liable notwithstanding a recital in the policy that it shall not be binding until the premium is actually paid in money. *New York L. Ins. Co.* v. *McGowan* (1877) 18 Kan. 300.

A condition of a bond of indemnity against loss by insolvent debtors, that in case the bond is renewed, and the premium on such renewal is paid at or before the expiration of the bond, loss on sales covered according to the terms, conditions, and limitations of the bond, resulting after said date of expiration upon shipments made during the term of the bond, may be proved under and subject also to the terms and conditions of such renewal,—is satisfied by the giving of a note for the premium of the renewal bond before the expiration of the preceding bond. *American Credit Indemnity Co.* v. *Champion Coated Paper Co.* (1900) 43 C. C. A. 340, 103 Fed. 609.

A provision of a policy requiring payment of the premium in actual cash as a condition to its inception may be waived by the acceptance of a note for the premium. *Lawrence* v. *Penn Mut. L. Ins. Co.* (1904) 113 La. 87, 36 So. 898, 1 Ann. Cas. 965; *Tooker* v. *Security Trust Co.* (1898) 26 App. Div. 372, 49 N. Y. Supp. 814, affirmed in 165 N. Y. 608, 59 N. E. 1093; *Little* v. *Eureka Ins. Co.* 5 Ohio Dec. Reprint, 285; *Stepp* v. *National Life & Maturity Asso.* (1892) 37 S. C. 417, 16 S. E. 134; *Southern L. Ins. Co.* v. *Booker* (1872) 9 Heisk. 606, 24 Am. Rep. 344; *East Texas F. Ins. Co.* v. *Mims* (1881) 1 Tex. App. Civ. Cas. (White & W.) 771.

Although on the face of the policy the premium is payable in cash, and one of the conditions of the policy is that "no insurance

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will be considered binding until the actual payment of the premium," this condition is waived by the delivery of the policy without such payment and by taking the note of the insured therefor. *Little* v. *Eureka F. & M. Ins. Co.* (1882) 38 Ohio St. 110.

An insurance company by delivering a policy and accepting a note for the first premium thereby waives a provision declaring that the policy shall not take effect unless the first premium thereon has been paid and the policy delivered to the applicant within thiry days from the date thereof. *Noble* v. *Kansas City L. Ins. Co.* (1914) 33 S. D. 458, 146 N. W. 606.

A provision that a life insurance policy shall not take effect until payment of the first premium is waived by the acceptance of a promissory note for the premium, and the insurer is estopped from setting it up where representations have been made to the applicant that the insurance will take immediate effect. *Stewart* v. *Union Mut. L. Ins. Co.* (1898) 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876.

A condition in an application for insurance that the policy to be issued shall not take effect until the first premium shall have been paid and accepted by the insurer, may be waived by the acceptance of a promissory note. *Cranston* v. *West Coast L. Ins. Co.* (1914) 72 Or. 116, 142 Pac. 762; *Unterharnscheidt* v. *Missouri State L. Ins. Co.* (1912) 160 Iowa, 223, 45 L.R.A.(N.S.) 743, 138 N. W. 459.

The fact that the face of the note given to the soliciting agent amounts to slightly less than the sum due as the first premium is not important, as it will be presumed that the difference was waived. *Kilborn* v. *Prudential Ins. Co.* (1906) 99 Minn. 176, 108 N. W. 861; *New York L. Ins. Co.* v. *Pike* (1911) 51 Colo. 238, 117 Pac. 899.

The finding of the jury that an insurance premium has been paid is not conclusively negatived by the answer found in the application to the question whether the premium had been paid in advance, which states, "No, (A) Cash $5. (B) Note $30.70." *Unterharnscheidt* v. *Missouri State L. Ins. Co. supra.*

Although a policy provides on its face that the contract shall not be operative or binding until the actual payment of the initial premium and delivery of the policy, if the insurer delivers the policy and takes notes for the initial premium and gives to the insured a receipt for the premium payable in advance, containing the clause "the above premium settled by note," this will be a waiver of payment in cash and an acceptance of the note in lieu of cash; and the policy will thereupon take effect. *Hipp* v. *Fidelity Mut. L. Ins. Co.* (1907) 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892.

But the delivery of a policy of life insurance in advance of the payment of the first premium, a memorandum on a note for the initial premium taken at the time of the application for the insur-

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ance to the effect that it was to be returned if the application should not be accepted, and evidence given by the agent that the note was taken "to tie the applicant up," are insufficient to warrant the jury in finding that the note was accepted as an actual payment of the premium so as to initiate the insurance. *McDonald* v. *Provident Sav. Life Assur. Soc.* (1900) 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154.

Where an agent having authority to collect the first year's premium accepts a note in part payment thereof, and no objection is made by the insurer on that ground, there is a sufficient payment of the premium to initiate the insurance, notwithstanding the application contained a provision that there should be no contract of insurance and no policy should be in effect until the first premium should be paid by the insured during her lifetime and while she was in good health. *Rankin* v. *Northern Assur. Co.* (1915) — Neb. —, 152 N. W. 324.

A note given by an applicant and received by the insurer, for the premium on a policy which was issued to the applicant and retained by him, is supported by a sufficient consideration though the application, which is made a part of the policy, provides that the insurance shall not take effect or be binding until the first premium has been paid to the company, and that if a promissory note or obligation is given for the premium, and not paid at maturity, the policy shall not be in force while the default continues, but that the party shall be liable on the note. *Crawford* v. *Sipprell* (1901) 35 N. B. 344.

If the agents of the insurer, acting for themselves, advance the money for the premiums and take the insured's note for the amount thereof as their own, this is a sufficient compliance with the condition in the policy requiring the premium to be actually paid before the insurer shall become liable. *Home Ins. Co.* v. *Curtis* (1875) 32 Mich. 402; *Krause* v. *Equitable Life Assur. Soc.* (1894) 99 Mich. 461, 58 N. W. 496.

But where it does not appear that the soliciting agent was allowed at his option to substitute a personal liability of his own to the insurer in the place of the money which he was to collect as premium, but on the other hand the application for insurance expressly stipulates that the policy shall not have force until the premium is actually received, the acceptance of the note of a third party by the soliciting agent is not a payment of the premium. *Continental L. Ins. Co.* v. *Willets* (1872) 24 Mich. 268.

c. As satisfying requirement that initial premium must have been paid while assured was in good health.

A provision that the policy shall not go into effect until the first premium has been actually paid during the lifetime and good

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health of the assured may be waived by the acceptance of a promissory note for the initial premium. *Provident Sav. Life Assur. Soc.* v. *Oliver* (1899) 22 Tex. Civ. App. 8, 53 S. W. 594.

See also *Rankin* v. *Northern Assur. Co.* (1915) — Neb. —, 152 N. W. 324, under II. b, *supra.*

Where there is no rule of the insurer, condition in the policy, or in the application for it, or in any instruction to the agents, which prohibits payment by note, or which renders the policy inoperative until payment in money is made or duly waived, a condition that the first premium shall be paid while the insured is in good health is satisfied by the giving of a note and the issuance in exchange therefor of a premium receipt. *Harrigan* v. *Home L. Ins. Co.* (1900) 128 Cal. 531, 58 Pac. 150, 61 Pac. 99.

A provision in a policy of insurance to the effect that it shall not be binding until the payment in cash of the first premium during the lifetime and good health of the assured is waived where the insurer takes a note for the amount of the premium which, at the time of the insured's death, had been sent with the policy to a banker for collection. *Kelly* v. *St. Louis Mut. L. Ins. Co.* (1877) 3 Mo. App. 554.

But where an application for insurance stipulated that the policy should not take effect until the first premium should have been paid during the continuance of the applicant in good health, and an instrument issued by the soliciting agents acknowledged receipt of a note "which if paid when due will be in full for the first annual premium for a policy of insurance . . . provided a policy is issued on his application," such receipt negatives the idea that the note was accepted as payment of the first annual premium, but expressly indicates that it was not to be so taken unless paid when due during the continuance and good health of the applicant. *Stringham* v. *Mutual Ins. Co.* (1904) 44 Or. 447, 75 Pac. 822.

d. As entitling insured to benefit of paid-up or extended insurance, or as completing right to surrender value.

Paid-up insurance.

In *Symonds* v. *Northwestern Mut. L. Ins. Co.* (1877) 23 Minn. 491, it was held that where notes were received in lieu and in satisfaction of the cash part of annual premiums, the giving of them had, so far as payment of such premiums were concerned, the same effect as payment of the cash would have had to give the assured the benefit of a provision that as often as the complete annual premium should be paid the policy should become a paid-up policy for a certain proportion of the whole amount insured.

And where the right to forfeit a policy for nonpayment of a note

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has been waived by the insurer, such note must be considered as a payment of the premium in determining the right to paid-up insurance. *Montgomery* v. *Phœnix Mut. L. Ins. Co.* (1878) 13 Bush, 51.

It has been held that where a note given for a premium contained this condition: "This note is given in part payment of the annual premium on policy numbered as per margin, with the understanding that all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to said company if this note is not paid at maturity,"—failure to pay the note at maturity deprives the insured of the benefit of a provision in the policy that if, after three annual payments of premiums have been made, the assured should fail to make payment of any further premium when due, then upon a surrender of the policy within thirty days after such unpaid premium should be due the company would in exchange issue a paid-up policy for the amount of the even dollars of premium received by it on the policy. *Holly* v. *Metropolitan L. Ins. Co.* (1887) 105 N. Y. 437, 11 N. E. 507.

But in *Montgomery* v. *Phœnix Mut. L. Ins. Co. supra,* it was held that where by the terms of the policy the insured would have been entitled to a paid-up policy for an amount proportionate to the annual premiums paid even if he had failed to pay any part of a subsequent premium, the stipulation in a note given for a portion of such subsequent premium that unless paid at maturity the policy shall be void must be considered as having been intended alone as a penalty to secure prompt payment, and will not be given effect in equity.

And in *Southern Mut. L. Ins. Co.* v. *Montague* (1883) 5 Ky. L. Rep. 515, it was held that a stipulation in a note executed by the insured for a premium, that the policy should cease and determine fully on default in payment of the note at maturity, did not deprive the insured to his right to a paid-up policy upon his failure to pay the note when due, the right thereto having accrued before the execution of the note.

The inclusion of the principal of a premium note in each successive premium note does not constitute full payment of the premium within the terms of the nonforfeiture clause of the policy, or a clause which provides for paid-up insurance to extend to so many fractional parts of the principal as should be represented by the premiums fully paid. *Hoar* v. *Union Mut. L. Ins. Co.* (1907) 118 App. Div. 416, 103 N. Y. Supp. 1059.

A demand for a paid-up policy, under a provision in the original policy that if, after the receipt by the insurer of two or more annual premiums, the policy should cease in consequence of the nonpayment of premiums, then, upon a surrender of the policy within twelve

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months after such unpaid premium becomes due, the insurer will in exchange issue a paid-up policy for a sum equal to one tenth of the sum insured for each premium paid,—is too late where made more than twelve months after the maturity and nonpayment of the first of the series of notes given for an annual premium. *Hudson* v. *Knickerbocker L. Ins. Co.* (1877) 28 N. J. Eq. 167.

Extended insurance.

The nonpayment of a note given for part of a premium is a nonpayment of the premium to that extent, and entitles the insured to the benefit of extended insurance provided for by statute in case of default in payment of a premium. *Marston* v. *Massachusetts L. Ins. Co.* (1879) 59 N. H. 92.

In determining the time from which the insured is entitled to extended insurance upon a default in the payment of premium, the time at which a note given therefor became due, and not the time at which the premium was payable, is to be taken. *Ibid.*

In determining the amount of extended insurance which the net value of the policy at the time of forfeiture will purchase, the amount of an unpaid premium note is to be deducted from the value of the policy at the time of the forfeiture. *Ibid.*

A note accepted by the insurer in payment of a premium is not an "indebtedness against the policy" within a provision of the policy that, after having been in force a certain length of time, "in case of nonpayment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy, . . . the insurance will be extended for the face amount as provided in the table below," so that the payment of the note has been held not to be a condition precedent to the right to extended insurance for the time limited by the table embodied in the contract. *New York L. Ins. Co.* v. *Smith* (1903) 139 Ala. 303, 35 So. 1004. But in *New York L. Ins. Co.* v. *Van Meter* (1909) 137 Ky. 4, 136 Am. St. Rep. 282, 121 S. W. 438, it was held that a note accepted by the insurer in payment of a premium is not an "indebtedness" within a provision of the policy that after having been in force three full years, if any subsequent premium is not duly paid, "the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of $1,000, during the term provided in the table on the preceding page," so that the payment of the note is not a condition precedent to the right to extended insurance. This conclusion is based on the fact that the note itself provided that, unless interest thereon and subsequent premiums on the policy should be duly paid, the policy and its accumulations should immediately become forfeited and void "except as to the right to a

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surrender value or paid-up policy which may be provided in said policy or by the statute," and that in the settlement of any claim or any benefit under said policy, "before this obligation shall have been fully paid, the amount thereof shall be deducted from the amount otherwise payable by said company." And in *Dibrell* v. *Citizens' L. Ins. Co.* (1913) 152 Ky. 208, 153 S. W. 428, an unpaid past-due note given for an insurance premium already earned was treated as an indebtedness against the policy within the meaning of the provision therein for extended insurance.

The right to the benefit of extended insurance, under a policy providing for its forfeiture in case of nonpayment of premiums, "with the exception that in case this policy is allowed to lapse after one full annual payment has been made, the insurance will be continued in force for the period which the equitable value of the policy at the time of lapse would purchase,"—is not abridged by a provision in a note taken for instalments of premiums then due and unpaid, that if not paid at maturity the policy should be null and void. *Watts* v. *Atlantic Mut. L. Ins. Co.* (1880) 31 U. C. C. P. 53.

A provision in a policy for a forfeiture if any note given in whole or part payment of premiums shall not be paid at maturity does not deprive the insured in such a case of his right under a clause providing for nonforfeitable paid-up insurance, but such provision is limited in its scope, after the required number of annual premiums have been paid, to the contract as a general policy of life insurance. *Ferguson* v. *Union Mut. L. Ins. Co.* (1904) 187 Mass. 8, 72 N. E. 358.

Where a note given for an insurance premium provides for a forfeiture in case of nonpayment at maturity except as to the right of a surrender value or paid-up policy which may be provided for in the policy or by statute, and one of the surrender values referred to in the policy is extended insurance, the nonpayment of the note does not affect the insured's right to extended insurance. *New York L. Ins. Co.* v. *Van Meter, supra.*

A provision in a note given for a premium that in case of its nonpayment at maturity "all claims to further insurance and all benefits whatever, which full payment in cash for said premium would have secured, shall become immediately void and forfeited . . . except as otherwise provided in the policy itself," does not operate to deprive the insured of the right to extended insurance as stipulated in the policy, which specified no time limit in which application must be made therefor, but on the contrary provided, under proper circumstances, for an automatic extension. *Hayes* v. *New York L. Ins. Co.* (1910) 68 Misc. 558, 124 N. Y. Supp. 792 (affirmed without opinion in 150 App. Div. 927, 135 N. Y. Supp. 1116, which is affirmed in 211 N. Y. 9, 104 N. E. 1122).

In *Kelsey* v. *Union Cent. L. Ins. Co.* (1912) 116 C. C. A. 27, 196

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Fed. 195, where a life insurance policy provided that after the payment of three annual premiums, "except in case of failure to pay at maturity a note given for premium or for a loan," the policy, if not surrendered for conversion into a paid-up policy, will be continued in force for so long as its reserve value is sufficient to pay the premiums thereon; and, further, that the failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium on or before the days upon which they become due, shall avoid and nullify the policy without action on the part of the company or notice to the insured or beneficiary,—it was held that though the policy was susceptible of the interpretation that the rights of the beneficiary to extended or term insurance are not given in case of failure to pay when due any note given for the whole or any part of any premium, although subsequently to the third, such construction was not so clear and unambiguous as to warrant the court, in view of the rule that forfeiture is not favored, and that any ambiguity should be resolved in favor of the insured, in adopting it, but that a forfeiture of the right to term insurance arose only in case of the nonpayment of notes given for the first three premiums. The court said: "We think the contract, construing all its terms together, cannot be said clearly and unambiguously to admit only of the interpretation put upon it by defendant. On the other hand, we think it fairly and reasonably susceptible of plaintiff's construction. Defendant's interpretation is not, at first view, the natural one. It requires argument and elaboration. We think a business man of ordinary intelligence and experience would construe the contract, taken together, as meaning that, after three full annual premiums had been actually paid (not paid merely by the giving of note), no forfeiture could result from nonpayment of premium which would destroy the right to a paid-up term policy automatically arising. In the first place, it would, we think, seem unnatural to expect that a right offered by the policy, and not subject to loss by complete default, should yet be lost through partial default only."

In *Drury* v. *New York L. Ins. Co.* (1903) 115 Ky. 681, 61 L.R.A. 714, 103 Am. St. Rep. 351, 74 S. W. 663, it is held that a surrender of the right to extended insurance for the term earned by the premiums paid is not effected by the execution of, and failure to pay, a premium note, a clause in which provides that such failure shall work a forfeiture of the policy "except as to the right to a surrender value or paid-up policy, which may be provided in the policy," where the policy provides, under the head of surrender values, for either a paid-up policy or extended insurance, and states that in case of a failure to demand a paid-up policy within six months after

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default, the policy will be extended without request or demand for the time specified in the schedule annexed.

In *Lesseps* v. *Fidelity Mut. L. Ins. Co.* (1908) 120 La. 610, 45 So. 522, it was held that failure to pay a note given for the third annual premium at its maturity was fatal to a claim of right to the benefit of a stipulation that after the payment of the first three premiums the insured should have the right to demand either a cash loan of a certain amount, a paid-up policy for a certain amount, or to have the policy automatically extended for a certain period, where the insured was notified of the forfeiture of the policy by reason of the nonpayment of the note at its maturity, though the insurer afterwards collected the note, claiming that the insured owed it for the protection which he had received.

In *Tilley* v. *Confederation Life Asso.* (1900) 7 B. C. 144, it was held that the giving of a note for the amount of a renewal premium containing the condition that if not paid at maturity the policy should forthwith become null and void, and by which it was also agreed that should payment of the note be made subsequent to the date at which it should become due, such payment should not be held to have put the policy in force, but that the policy might be reinstated under the rules of the association,—which note was not paid at maturity, but on which the insured had paid various amounts from time to time,—was not such a payment of the premium as would entitle the insured to extended insurance under the nonforfeiture provisions of the policy.

The acceptance of a part of a premium due in cash, and for the balance a promissory note which contains a stipulation that it is payable without grace, and that "all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself," will not operate to give the holder of the policy the benefit of an extension of the contract of insurance provided by its terms, when the policy stipulates that such extension is to be effected by the payment of premiums, where the note itself is not paid at maturity. *Bank of Commerce* v. *New York L. Ins. Co.* (1906) 125 Ga. 552, 54 S. E. 643.

Where a note given for a premium specifies that it is given on account of the policy, and that unless paid when it becomes due such policy will lapse as for nonpayment of premium when due, the presumption that it was accepted in payment of the premium is overcome, and where the insured fails to pay it at maturity he cannot base thereon a claim to the benefit of extended insurance.

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Union Mut. L. Ins. Co. v. *Adler* (1905) 38 Ind. App. 530, 73 N. E. 835, 75 N. E. 1088.

The nonpayment of a premium note containing a stipulation that all claims to further insurance and all benefits whatever which full payment in cash of the premium would have secured shall become immediately void, and be forfeited to the insurer, if the note is not paid at maturity, except as otherwise provided in the policy itself, works a forfeiture of the benefit of a provision in the policy that if any premium or indebtedness is not duly paid, the excess of the reserve fund over any indebtedness to the company may be applied to the purchase of paid-up or extended insurance. *Sharpe* v. *New York L. Ins. Co.* (1904) 5 Neb. (Unof.) 278, 98 N. W. 66.

Where a condition in a life insurance policy is to the effect that "in case of default for nonpayment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon payment of all outstanding premium notes, become a paid-up term policy, without change of terms or conditions," the payment of all outstanding premium notes, though given after three annual premiums had been paid, is a condition precedent to such policy becoming a paid-up term policy. *Union Cent. L. Ins. Co.* v. *Buxer* (1900) 62 Ohio St. 385, 49 L.R.A. 737, 57 N. E. 66.

Where a policy of life insurance provides that if any annual payment shall not be paid as required the policy will be continued for its full amount until a specified date, or, if the insured shall make demand for and surrender the policy within six months after default, that he shall be entitled to paid-up insurance for a stipulated sum, a note given for a premium cannot be considered as having been paid by the counter-indebtedness of the insurer for paid-up insurance for which no demand has been made, so as to give the insured the benefit of the provision for extended insurance. *New York L. Ins. Co.* v. *Meinken* (1904) 25 Ky. L. Rep. 2113, 80 S. W. 175.

Granting of an extension of time in which to pay a premium, by accepting a note therefor, is a sufficient consideration in law for the stipulation of the insured that if the note given for the premium is not paid at maturity, the policy, "including all conditions therein for surrender or continuance as a paid-up term policy," should be null and void. *Seeley* v. *Union Cent. L. Ins. Co.* (1899) 10 Pa. Super. Ct. Rep. 270.

As completing right to surrender value.

The giving of a note is not such a payment of the third annual premium on a policy of life insurance as will entitle the insured to the benefit of a provision that after three or more annual premiums

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have been paid thereon it may be surrendered for its cash value, where the policy declares that, if the first or any subsequent premium on the policy shall be settled wholly or in part by note or other obligation, such settlement shall not be deemed a payment, but only an extension of the time for such payment of premium, and it is stipulated in the application for the policy that neglect to pay any premium on or before the day it becomes due shall invalidate the policy. *Kinne* v. *Michigan Mut. L. Ins. Co.* (1896) 92 Wis. 335, 66 N. W. 359.

e. Effect of recital in policy of fact that premium has been paid.

Although the acknowledged receipt of the premium in the policy cannot be denied so as to destroy the original validity of the policy, such acknowledgment will not shut out proof that for such premium a note was given, and that the policy has become forfeited by a subsequent failure to pay said note. *Mooney* v. *Home Ins. Co.* (1899) 80 Mo. App. 192.

The acknowledgment of the receipt of the first premium as contained in the face of the policy may be explained by showing that, contemporaneously with the delivery of the policy, the insured executed his promissory note payable to the company for the premium, and that by the terms of the policy failure to pay the premium note at maturity will forfeit the policy. In such a case the insurance will become effective upon the delivery of the policy, subject to forfeiture for breach of the condition subsequent, namely, the nonpayment of the note; but like other forfeitures for failure to comply with conditions subsequent, the company may waive the forfeiture arising from failure to pay the note. *Williams* v. *Empire Mut. Annuity & L. Ins. Co.* (1910) 8 Ga. App. 303, 68 S. E. 1082.

An acknowledgment in the policy that the premium has been paid will not preclude the insurer from showing that a note was taken for a portion thereof, and that the note remains unpaid. *Robert* v. *New England Mut. Ins. Co.* (1858) 2 Disney (Ohio) 106.

The acknowledgment in a policy of the receipt of the initial premium does not preclude the insurer from claiming the benefit of a stipulation therein that if any premium note shall not be paid when due the policy shall become void. (*Leeper* v. *Franklin L. Ins. Co.* (1902) 93 Mo. App. 602, 67 S. W. 941; *Dircks* v. *German Ins. Co.* (1888) 34 Mo. App. 31; *Baker* v. *Union Mut. L. Ins. Co.* (1871) 43 N. Y. 283); even as against an assignee of the policy (*How.* v. *Union Mut. L. Ins. Co.* (1880) 80 N. Y. 32).

And the fact that the policy in terms acknowledges receipt of the first premium does not estop the insurer from relying upon the nonpayment of a note given therefor as effecting a suspension of the policy by virtue of a provision therein that the insurer shall not be

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liable for any loss or damage that may occur "while any single payment, promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium remains past due and unpaid." *Mooney* v. *Home Ins. Co.* (1897) 72 Mo. App. 92.

On the other hand, in *Illinois Cent. Ins. Co.* v. *Wolf* (1865) 37 Ill. 354, 87 Am. Dec. 251, it is held that where a policy admits the payment of the premium it may not be shown by parol evidence that it was not in fact paid but a note at sixty days taken therefor, so as to enable the insurer to take advantage of a provision in the policy that if a note taken for a premium is not paid when due the policy shall then be void; the effect of such evidence being to change a policy of insurance running for five years, and good upon its face, into one expiring in sixty days from its date.

In *Hemmenway* v. *Bradford* (1817) 14 Mass. 121, it was held that where, in a policy of insurance, the underwriter acknowledges the premium paid, and the assured has afterwards a right to a return of the premium, he may recover the same in an action for money had and received although he has given his promissory note therefor, which is still unpaid.

A note given for part of an initial premium of insurance, containing the condition that if it is not paid at maturity the policy shall be canceled and become null and void, is a written admission that the recital of payment in the policy is not true, and therefore cannot give effect to the policy as an actual payment would. *Kerns* v. *New Jersey Mut. L. Ins. Co.* (1878) 86 Pa. 171.

See also in this connection, *Pitt* v. *Berkshire L. Ins. Co.* (1868) 100 Mass. 500; *Bigelow* v. *State Mut. Life Assur. Asso.* (1876) 123 Mass. 113; *Goddard* v. *Northwestern Mut. Fire Asso.* (1915) 85 Wash. 585, 148 Pac. 893, set out under IV. a, *infra.*

As to effect of statute declaring that an acknowledgment in a policy of a receipted premium is conclusive evidence of its payment so far as to make the policy binding, to limit operation of stipulation in policy as to effect of nonpayment of any note given for a premium to notes given for other than the first premium, see *Chasse* v. *Bankers' Reserve Fund L. Ins. Co.* (1910) 27 S. D. 70, 129 N. W. 568; *Noble* v. *Kansas City L. Ins. Co.* (1914) 33 S. D. 458, 146 N. W. 606; *Palmer* v. *Continental Ins. Co.* (1901) 132 Cal. 68, 64 Pac. 97.

f. Effect of giving receipt for premium.

See, as to the effect of a receipt to show acceptance of note in payment of premium, *Hipp* v. *Fidelity Mut. L. Ins. Co.* (1907) 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892, under II. b, *supra; Harrigan* v. *Home L. Ins. Co.* (1900) 128 Cal. 531, 58 Pac. 150,

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61 Pac. 99, under II. c, *supra; Tutt* v. *Covenant Mut. L. Ins. Co.* (1885) 19 Mo. App. 677, under III. b, *infra.*

Where a policy contains a provision that it shall be void upon the failure to pay at maturity notes given for premiums, the delivery of a receipt to the assured acknowledging receipt of the cash premium can avail him nothing, he being bound by the forfeiture provision in the policy. *Union Cent. L. Ins. Co.* v. *Duvall* (1894) 16 Ky. L. Rep. 398.

In *Sexton* v. *Greensboro L. Ins. Co.* (1912) 160 N. C. 597, 76 S. E. 535, it was held that a receipt for a premium on a life insurance policy pinned to a note for a part of the premium, and held by the insurer, which expressed on its face the agreement that if the note was not paid at maturity the policy should be void, was competent evidence on behalf of the insurer tending to show that there has been neither payment nor waiver of payment of the premium.

III. Effect of nonpayment.

a. In general.

As to effect of nonpayment where policy recites that premium has been paid, see II. e, *supra.*

As to effect of nonpayment where receipt for premium has been given, see II. f, *supra.*

As to effect of nonpayment of note at maturity upon right to paid-up or extended insurance, see II. d, *supra.*

Death of assured as excuse for nonpayment of note for premium on fire insurance policy, see *Continental Ins. Co.* v. *Daly* (1885) 33 Kan. 601, 7 Pac. 158; *Sauner* v. *Phœnix Ins. Co.* (1890) 41 Mo. App. 480, under IV. a, *infra.*

In the absence of some stipulation to that effect, the mere nonpayment of a premium note when it falls due will not vitiate the policy (*Parker* v. *Capital L. Ins. Co.* (1915) 48 N. S. 404, 22 D. L. R. 325; *La Compagnie D'Assurance Des Cultivateurs* v. *Grammon* (1879) 24 Lower Can. Jur. 82; *Mutual L. Ins. Co.* v. *Allen* (1904) 212 Ill. 134, 72 N. E. 200; *Bradley* v. *Federal L. Ins. Co.* (1913) 178 Ill. App. 524; *Trade Ins. Co.* v. *Barracliff* (1883) 45 N. J. L. 543, 46 Am. Rep. 792; *Arkansas Ins. Co.* v. *Cox* (1908) 21 Okla. 873, 20 L.R.A.(N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552), even though the note be given for an initial premium (*Lawrence* v. *Penn Mut. L. Ins. Co.* (1904) 113 La. 87, 36 So. 898, 1 Ann. Cas. 965; *Shaw* v. *Republic L. Ins. Co.* (1876) 67 Barb. 586, affirmed in 69 N. Y. 286; *Stepp* v. *National Life & Maturity Asso.* (1892) 37 S. C. 417, 16 S. E. 134).

See also in this connection, *The Natchez* (1890) 42 Fed. 169; *Home F. Ins. Co.* v. *Stancell* (1910) 94 Ark. 578, 127 S. W. 966;

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Bell v. *Hudson Bay Ins. Co.* (1911) 44 Can. S. C. 419; *McGugan* v. *Manufacturers & M. Mut. F. Ins. Co.* (1879) 29 U. C. C. P. 494; under II. a, *supra.*

If an insurance company delivers a policy under such circumstances that it goes into force at once, and accepts in lieu of cash the promissory note of the person insured, made payable to the company, and the note is delivered and accepted as payment, the failure to pay the note will not forfeit the policy. *Penn Mut. L. Ins. Co.* v. *Norcross* (1904) 163 Ind. 379, 72 N. E. 132.

In *Goddard* v. *Northwestern Mut. Fire Asso.* (1915) 85 Wash. 585, 148 Pac. 893, where an insurance company issued a policy to its agents upon grain in storage as specified in certificates of assignment to be issued by the agents as contemplated by the terms of the policy, which contained the following provision: "The premium specified in this policy shall be due on the date the insurance becomes effective. Thirty days' grace will be allowed before the payment becomes delinquent. This association shall not be liable on this policy for the payment of any loss or damage that may occur to the property insured herein when the insured is delinquent on any premium payment due on this policy," and the agents assigned a portion of such insurance by a certificate of assignment reciting that it was "in consideration of $35 in hand paid," but instead of cash took a promissory note for that sum, which at the time of the loss was overdue and unpaid,—it was held that in view of the recital in the certificate of assignment of the insurance, which is in effect an acknowledgment of the receipt of the premium in full, the delivery of the assignment, the acceptance of the promissory notes, which contained no provision looking to termination of the insurance upon a failure to pay the notes at maturity, and the absence of any such provision in the policy or certificate of assignment, the note was accepted as cash in full payment of the premium; and therefore that its nonpayment at maturity had no effect whatever upon the insurance.

Where a benefit certificate contains no express stipulation that the failure to pay a note given for the membership fee when due will render it void, and after a note so given becomes due the time of payment is extended, and death occurs before this time of payment runs out, no forfeiture of the certificate of membership can be declared for nonpayment of the note when first due. *Kansas Protective Union* v. *Whitt* (1887) 36 Kan. 760, 59 Am. Rep. 607, 14 Pac. 275.

A premium note, when negotiable, is entitled to grace as other commercial paper. *Jarman* v. *St. Louis Mut. L. Ins. Co.* (1876) 1 Flipp. 548, Fed. Cas. No. 7,221.

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b. As reviving right to forfeit policy for nonpayment of premium.

There is a difference of opinion as to whether the acceptance by the insurer, of a note for a premium, constitutes a waiver of the right reserved by the policy to forfeit the insurance in case of default in the payment of any premium, or merely operates to suspend it until the maturity of the note.

Thus, on the one hand, it is held that the forfeiture of a policy for nonpayment of a premium when due is waived by the acceptance of a part of the premium in cash and the assured's note for the balance. *New York L. Ins. Co.* v. *Smith* (1897) — Tex. Civ. App. —, 41 S. W. 680.

An insurer, by taking a note for a cash premium and giving a receipt for the amount as if paid in cash, loses its right to forfeit the policy for nonpayment of the cash premium, notwithstanding the note is not paid at maturity. *Tutt* v. *Covenant Mut. L. Ins. Co.* (1885) 19 Mo. App. 677.

The giving of a note by the insured for a premium, and the acceptance of such note by the insurer as payment of the premium, is equivalent to a cash payment; and default in the payment of such note at maturity will not work a forfeiture of the policy, unless it is so expressly stipulated by the parties at the time such note was given and received. *Massachusetts Ben. L. Ins. Co.* v. *Robinson* (1898) 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918.

Any forfeiture incurred by virtue of a provision of the policy that in case any premium is not paid when due the policy shall cease and determine is waived by the acceptance of a promissory note for the amount of the premium, and the insurance is continued until further grounds of forfeiture occur. *State L. Ins. Co.* v. *Chowning* (1911) 27 Okla. 722, 113 Pac. 715.

If an insurance company accepts and retains a note, check, or other interest-bearing obligation for the premium, the policy will not be held to be lapsed or forfeited for nonpayment of premium, even though the note or other obligation is not paid at maturity, unless there is an express provision in the policy providing that a failure to pay any such obligation at maturity shall result in a lapsing or a forfeiture of the insurance. *Veal* v. *Security Mut. L. Ins. Co.* (1909) 6 Ga. App. 721, 65 S. E. 714.

On the other hand, it has been held that where one insured under a policy providing that it should lapse if any premium thereon should not be paid when due gave his note for a premium then due, receiving in exchange a receipt stating that it was "for renewal of the policy," it was held that unless the note was received by the insurer as payment of the premium, it operated merely to extend the time

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for paying the cash premium until its maturity, and if not paid at maturity did not relieve the policy from forfeiture for nonpayment of the cash premium. *Wilmot* v. *Charter Oak L. Ins. Co.* (1878) 46 Conn. 483.

In *Beezley* v. *Des Moines Life Asso.* (1896) 100 Iowa, 436, 69 N. W. 549, where the first quarterly premium was paid in cash when the policy was issued, and a note was taken at the same time for the three remaining instalments, payable at quarterly intervals, it was held that the taking of the note under such circumstances did not operate to prevent the insurer from relying upon a provision of the policy "that if the quarterly payments . . . are not received by the association within sixty days from date of the notice, then this policy shall be null and void and of no effect."

Where as a matter of favor to the insured credit is extended to him for some portion of a cash premium, the failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy will be forfeited. *St. Louis Mut. L. Ins. Co.* v. *Grigsby* (1874) 10 Bush, 310.

The execution of a note for an annual premium does not constitute a waiver of the right to forfeit the policy upon the part of the insurer, but is an agreement not to enforce the consequences of the forfeiture during the currency of the note, and until it should become due. *Johnson* v. *Southern Mut. L. Ins. Co.* (1881) 79 Ky. 403.

The right to forfeit a policy for nonpayment of a premium under a provision therein that it should become null and void unless the moneys required to be paid by it should be actually paid when due is not waived by the acceptance of a note, the effect being simply to extend the time for the payment of the premium,—especially where the note contains a stipulation that if not paid at maturity the policy shall become null and void. *Fidelity Mut. L. Ins. Co.* v. *Price* (1903) 117 Ky. 25, 77 S. W. 384.

Where the policy, in addition to the usual condition that it should become void if the annual premiums should not be paid on the day when they severally become due, contained a provision avoiding the policy in case of nonpayment of any notes given in payment of premiums, the taking of a note, while a waiver of the primary condition of forfeiture for nonpayment of the annual premium, brings into operation the secondary condition by which the policy is to be void if the note is not paid at maturity. *Thompson* v. *Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765.

As to the effect of an express provision covering the case of failure to pay a note given for a premium, see also IV., *post.*

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IV. Effect of express stipulation suspending or avoiding policy in case of nonpayment of note at maturity.

a. In general.

Like the makers of armor plate, who, when a new gun is invented, are driven to devise a heavier armament, the insurance companies have been compelled by the course of the decisions to insert in their contracts a stipulation to the effect that failure to meet at maturity a note given for a premium will work a suspension or forfeiture of the policy. Such a stipulation has been universally treated, and sometimes explicitly characterized, as a valid and reasonable one.

Thus in *Barnes* v. *Continental Ins. Co.* (1888) 30 Mo. App. 539, it was said that insurance contracts are voluntary ones, and the insurers have the same right to incorporate and impose a condition suspending liability for loss so long as any premium note or instalment thereon shall remain unpaid as they have other conditions, and if the assured objects to it he is under no obligation to enter into the contract. And see also, as expressly affirming the validity of such a provision, *Palmer* v. *Continental Ins. Co.* (1900) 6 Cal. Unrep. 455, 61 Pac. 784; *Michigan Mut. L. Ins. Co.* v. *Custer* (1890) 128 Ind. 25, 27 N. E. 124; *Watrous* v. *Mississippi Valley Ins. Co.* (1872) 35 Iowa, 582; *Harle, H. & Co.* v. *Council Bluffs Ins. Co.* (1887) 71 Iowa, 401, 32 N. W. 396; *Continental Ins. Co.* v. *Daly* (1885) 33 Kan. 601, 7 Pac. 158; *Hodge* v. *Continental Ins. Co.* (1890) 12 Ky. L. Rep. 138; *Robinson* v. *Continental Ins. Co.* 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647; *American Ins. Co.* v. *Klink* (1877) 65 Mo. 78; *Sauner* v. *Phœnix Ins. Co.* (1890) 41 Mo. App. 480; *Phenix Ins. Co.* v. *Bachelder* (1891) 32 Neb. 490, 29 Am. St. Rep. 443, 49 N. W. 217; *Phenix Ins. Co.* v. *Rollins* (1895) 44 Neb. 745, 63 N. W. 46; *Home F. Ins. Co.* v. *Garbacz* (1896) 48 Neb. 827, 67 N. W. 864; *Houston* v. *Farmers' & M. Ins. Co.* (1902) 64 Neb. 138, 89 N. W. 635; *McEvoy* v. *Michigan Mut. L. Ins. Co.* (1888) (Ohio), 2 Ohio C. D. 329; *St. Paul F. & M. Ins. Co.* v. *Cooper* (1909) 25 Okla. 38, 105 Pac. 198; *Joliffe* v. *Madison* (1875) 39 Wis. 115, 20 Am. Rep. 35.

So, also, a provision in a note given for an insurance premium that if the note is not paid at maturity the entire premium shall be considered as earned, and the policy shall be null and void so long as the note remains past due and unpaid, is not invalid (*New Zealand' Ins. Co.* v. *Maaz* (1899) 13 Colo. App. 493, 59 Pac. 213), or opposed to any rule of law or principle of public policy; but, on the contrary, is both reasonable and valid, it being competent for the parties to agree that the period of time to be covered by the insurance, and for which the stipulated amount of premium shall be paid,

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may be made shorter upon any contingency the parties see fit to agree upon without altering the amount of the premium,—especially upon any contingency which the insured has it in his own power to prevent, and which it is his moral and legal duty to prevent (*Williams* v. *Albany City Ins. Co.* (1870) 19 Mich. 451, 2 Am. Rep. 95).

And a stipulation in a policy of insurance, in a note for the premium, or in any other instrument evidencing the contract of insurance or a part of it, to the effect that the policy or the insurance shall become void if the premium is not paid on the agreed day, is conscionable, valid, and enforceable. *Manhattan L. Ins. Co.* v. *Wright* (1903) 61 C. C. A. 138, 126 Fed. 82.

A provision in a contract of insurance that where a note given for a premium is not paid when due the failure to pay shall work a forfeiture of the contract is a valid one, and will be enforced. *Travelers' F. Ins. Co.* v. *Mercer* (1912) 32 Okla. 503, 122 Pac. 134.

A provision in a policy of insurance that the failure to pay any premium, or any notes or interest upon notes given to the company for any premium, on or before the dates upon which such premiums, notes, or interest shall become due, shall avoid and nullify the policy without action on the part of the company, or notice to the insured or beneficiary,— is valid and binding. *Neal* v. *Gray* (1905) 124 Ga. 510, 52 S. E. 622.

It is competent for an insurance company to provide in its policies that if a premium note be not paid within sixty days after maturity, and suit be commenced for its collection, the policy shall be considered canceled and the whole premium shall be then earned, due, and payable, and that collection of such note by legal proceedings shall not in any case revive or bring into force such policy or any liability of the company thereunder. *Shultz* v. *Hawkeye Ins. Co.* (1875) 42 Iowa, 239; *Shakey* v. *Hawkeye Ins. Co.* (1876) 44 Iowa, 540.

Though an insurer accepting a note in lieu of a cash premium may stipulate that the policy shall become void if the note is not paid at maturity, such a stipulation is not valid where inserted in a note given for a loan out of which a premium is paid. This is because an agreement to forfeit or to lose money or property much in excess of interest during the delay on account of a failure to pay a loan on the stipulated day is a contract for a penalty for a failure to pay money, and is void because compensation is the basic rule for measure of damages, and interest during the delay is, under the law, full compensation therefor. *Manhattan L. Ins. Co.* v. *Wright* (1913) 61 C. C. A. 138, 126 Fed. 82.

It has been said that though the law does not forbid, it certainly will not favor, but rather lean against, a forfeiture of an insurance

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policy for a want of promptness in paying the premium note. *Sims* v. *State Ins. Co.* (1870) 47 Mo. 54, 4 Am. Rep. 311.

As to the effect of such stipulations to show that a note was not taken as payment, see *Wood* v. *Confederation L. Ins. Co.* (1901) 2 N. B. Eq. Rep. 217; *Manhattan L. Ins. Co.* v. *Myers* (1900) 109 Ky. 372, 59 S. W. 30; *Sexton* v. *Greensboro L. Ins. Co.* (1911) 157 N. C. 142, 72 S. E. 863; *Union Cent. L. Ins. Co.* v. *Whetzel* (1902) 29 Ind. App. 658, 65 N. E. 15; *Occidental L. Ins. Co.* v. *Jacobson* (1914) 15 Ariz. 242, 137 Pac. 869; *Citizens' Nat. L. Ins. Co.* v. *Morris* (1912) 104 Ark. 288, 148 S. W. 1019; *Continental Ins. Co.* v. *Dorman* (1890) 125 Ind. 189, 25 N. E. 213; *Thompson* v. *Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765; set out under II. a, *supra; Satterfield* v. *Fidelity Mut. L. Ins. Co.* (1911) 171 Ala. 429, 55 So. 200; *Manhattan L. Ins. Co.* v. *Myers* (1900) 109 Ky. 372, 59 S. W. 30; under II. b, *supra.*

As to the effect of an acknowledgment in the policy of the receipt of the initial premium to preclude the insurer from claiming the benefit of such a stipulation, see cases under II. e, *supra.*

As to the effect of the delivery of a receipt for the premium upon the right of the insurer to avail himself of such a stipulation, see under II. f, *supra.*

As to the effect of such a stipulation upon policy provisions for extended or paid-up insurance, or for payment of surrender value, in case of default in payment of premiums, see II. d, *supra.*

Grant of extension of time for payment of premium, by accepting note as sufficient consideration for stipulation for forfeiture of benefits of policy in case of nonpayment at maturity, see *Seeley* v. *Union Cent. L. Ins. Co.* (1899) 10 Pa. Super. Ct. 270, under II. d, *supra.*

The fact that a policy provides that it and the application should constitute the entire contract does not, as between the insurer and the insured or his administrator, preclude a stipulation in notes given for a portion of the initial premium, executed simultaneously with the policy and referring thereto, giving the insurer a right of forfeiture in case of nonpayment of the notes at maturity, from being considered a part of the contract; but the meaning to be attributed to such clause of the policy in order to bring it into harmony with the other stipulations, and especially those in the note, is that it prohibits future alterations of the contract save in the mode prescribed. *Marshall* v. *Missouri State L. Ins. Co.* (1910) 148 Mo. App. 669, 129 S. W. 40.

The delivery of a policy of insurance and the payment of the premium are reciprocal or concurrent considerations, and therefore a notice upon the back of a premium receipt that if a note is given for payment of premium and is not paid at maturity the policy shall

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determine constitutes a part of the contract of insurance, where such receipt states on its face that it is subject to the terms of the contract and the conditions on the back, which the assured is directed to read. *Iowa L. Ins. Co.* v. *Lewis* (1902) 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

A provision in a policy of insurance authorizing the deduction from the amount payable in the event of the death of the insured, of any balance of the premium for the year remaining unpaid, or any indebtedness on the policy, is not inconsistent with a provision that the policy should not longer be in force or binding upon the insurer if a note taken for a premium or any part thereof should not be fully paid when due, as such a provision would be applicable in the event of the death of the insured before the maturity of a premium note, or in case of a waiver by the insurer of the payment of the whole or a part of the premium at the time it was due. *Imperial L. Ins. Co.* v. *Glass* (1892) 96 Ala. 568, 11 So. 671.

There is no essential repugnancy between a note given for a part of the first premium of a life insurance policy which provides that failure to pay it at maturity will render the policy void, and the provisions of the policy itself, which recite that it was granted in consideration of the payment of a certain amount as the initial premium and the annual payment of the same sum each year thereafter for a certain period, that it should be incontestable one year after its date provided the premiums are duly paid, that after it has been in force for one year a grace of one month will be allowed in the payment of premiums, that after three annual premiums are paid if the policy remains in force the company will make a certain loan thereon, and that it will give insured an option in a table of loan values. *Marshall* v. *Missouri State L. Ins. Co.* (1910) 148 Mo. App. 669, 129 S. W. 40.

A provision in a policy that the omission to pay the annual premium on or before 12 o'clock noon on the day or days fixed for the payment thereof, or failure to pay at maturity any note other than the annual premium note given for premium, interest, or other obligation, shall then and thereafter cause the policy to be void, does not have the effect to require the payment of a note given for a portion of a premium on or before noon of the day of its maturity, although the note states that the policy "is to be void in case this note is not paid at maturity according to contract in said policy," such expression having reference to the effect of nonpayment at maturity rather than to the hour at which the note must be paid. *Leigh* v. *Knickerbocker L. Ins. Co.* (1874) 26 La. Ann. 436.

A provision in a policy of insurance that if the insured shall fail to pay annually in advance the interest on any unpaid note or loan which may be owing to the company on account of any premium, the

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company shall not be liable for the payment of the sum assured or any part thereof, and the policy shall cease and determine, is satisfied by a tender of such interest in advance within the days of grace to which the note, by the law governing commercial paper, is entitled. *Jarman* v. *St. Louis Mut. L. Ins. Co.* (1876) 1 Flipp. 548, Fed. Cas. No. 7,221.

The fact that the note was not at the time of maturity at the place where it was made payable will not prevent a forfeiture where it is not shown that the insured was ready and willing to pay the note at that place and time. *Texas F. Ins. Co.* v. *Knights of Tabor Lodge* (1903) 32 Tex. Civ. App. 328, 74 S. W. 809.

In *Crites* v. *Capital F. Ins. Co.* (1912) 91 Neb. 771, 137 N. W. 847, where the insurance contract provided in substance that if default should be made in payment of a note given for the premium the insurance should cease, and the note was sent prior to its maturity to a bank for collection, and the maker went to the bank at its customary hour for opening, on the day of maturity, prepared to pay the note, and waited for nearly half an hour, when, no one appearing, he went to his work, and the property was burned between 10 and 11 o'clock that night, it was held that having used due diligence in attempting to pay the note at the place selected by the insurance company, and the day not having expired when the property burned, the liability of the insurance company upon the policy continued in force.

Compliance with a condition in a fire insurance policy that failure to pay a premium note when it falls due will relieve the insurer from liability for any loss occurring during such default is not excused by the death of the assured before the maturity of the premium note, it being the duty of the person interested in the property to keep the policy alive. *Continental Ins. Co.* v. *Daly* (1885) 33 Kan. 601, 7 Pac. 158; *Sauner* v. *Phœnix Ins. Co.* (1890) 41 Mo. App. 480.

A confession of judgment on a note given for a premium does not amount to a payment of the premium so as to reinstate a policy suspended by reason of failure to meet a note given for the premium at maturity, and containing a provision that the payment of the premium shall revive the policy and make it good for the balance of its term. *Proebstel* v. *State Ins. Co.* (1896) 14 Wash. 669, 45 Pac. 308.

One who executes a promissory note for an insurance premium, which provides that failure to pay the note at maturity will terminate the insurance, but that if the note is collected after maturity and satisfactory evidence of the good health of the insured is furnished, the policy may be restored, waives the benefit of a clause in the policy giving the insured the right to restore the same after forfeiture at any time within a month without furnishing evidence of good health,

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on payment of the premium in default, with 6 per cent interest. *National L. Ins. Co.* v. *Manning* (1905) 38 Tex. Civ. App. 498, 86 S. W. 618.

A provision in a policy of insurance that the insurer shall not be liable for any loss or damage that may occur to the property insured while any note or obligation or part thereof given for the premium remains past due and unpaid includes the notes given for "first payment." *Palmer* v. *Continental Ins. Co.* (1900) 6 Cal. Unrep. 455, 61 Pac. 784.

A provision that the policy shall be avoided or forfeited on failure to pay any note or other obligation given for a premium applies to notes given for first as well as for future premiums, notwithstanding an acknowledgment in the policy of the payment of the first year's premium. *Pitt* v. *Berkshire L. Ins. Co.* (1868) 100 Mass. 500; *Bigelow* v. *State Mut. Life Assur. Asso.* (1876) 123 Mass. 113. But in *McAllister* v. *New England Mut. L. Ins. Co.* (1869) 101 Mass. 558, 3 Am. Rep. 404, it was held that a provision in a policy expressed to be made in consideration of a premium already paid and of a like sum to be paid annually during its continuance, and which "does not take effect until the premium is paid," that "in case any premium due upon the policy shall not be paid at the day when payable the policy shall thereupon become forfeited and void," can only apply to a policy which has once taken effect and the nonpayment of a premium payable after that time, and cannot be held to refer to that premium which the policy contemplates and requires to be paid before the contract of insurance has any binding force.

Where a statute declares that an acknowledgment in a policy of a receipted premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation that it shall not be binding until the premium is actually paid, a stipulation in the policy that it shall become null and void in case of the nonpayment of any note given for a premium must be held to apply only to notes given for other than the first year's premium. *Chasse* v. *Bankers' Reserve Fund L. Ins. Co.* (1910) 27 S. D. 70, 129 N. W. 568; *Noble* v. *Kansas City L. Ins. Co.* (1914) 33 S. D. 458, 146 N. W. 606; *Palmer* v. *Continental Ins. Co.* (1901) 132 Cal. 68, 64 Pac. 97, reversing on rehearing 6 Cal. Unrep. 455, 61 Pac. 784.

In *Union Cent. L. Ins. Co.* v. *Wilkes* (1899) 92 Tex. 468, 49 S. W. 1038, it was held that the premium notes mentioned in the conditions of the policy providing for extended insurance, that the premiums should have been paid for three years and that all premium notes should have been paid at maturity, are not merely notes which may have been given for one or more of the premiums of the first three years, but are notes given for a premium at any time.

That a stipulation of the policy that "if any note or obligation

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given for the first premium or any part thereof shall not be paid when due, this policy contract shall be and become null and void without any notice or action on the part of the company notwithstanding any receipt given for the premium," does not affect a contract of insurance created by a receipt pending issuance of the policy, see *Citizens' L. Ins. Co.* v. *Coleman* (1912) 148 Ky. 750, 147 S. W. 414, under II. a, supra.

Where the policy provides for the payment of premiums in part by cash and in part by note, a provision that if the insured "shall fail to pay annually the interest on any unpaid notes or loans which may be owing by said insured to said company on account of any of the above-mentioned annual premiums . . . then and in any such case the company shall not be liable for the sum insured or any part thereof, and this policy shall cease and determine," has no application to a note executed for the cash portion of the premium. *Tutt* v. *Covenant Mut. L. Ins. Co.* (1885) 19 Mo. App. 677.

Where the contract of the parties provides that in case a note given for a premium is not paid at maturity the full amount of premium shall be considered as earned, and that the policy shall become void while the note remains overdue and unpaid, the insurer is not liable for a loss occurring while the policy remains suspended. *Cardwell* v. *Republic F. Ins. Co.* (1875) Fed. Cas. No. 2,396; *Williams* v. *Albany City Ins. Co.* (1870) 19 Mich. 451, 2 Am. Rep. 95; *American Ins. Co.* v. *Hornbarger* (1908) 85 Ark. 337, 108 S. W. 213; *Jefferson Mut. Ins. Co.* v. *Murry* (1905) 74 Ark. 507, 86 S. W. 813; *New Zealand Ins. Co.* v. *Maaz* (1899) 13 Colo. App. 493, 59 Pac. 213; *Carlock* v. *Phœnix Ins. Co.* (1891) 138 Ill. 210, 28 N. E. 53; *Leng* v. *German F. Ins. Co.* (1897) 74 Ill. App. 341; *Michigan Mut. L. Ins. Co.* v. *Custer* (1890) 128 Ind. 25, 27 N. E. 124; *Watrous* v. *Mississippi Valley Ins. Co.* (1872) 35 Iowa, 582; *Nedrow* v. *Farmers' Ins. Co.* (1876) 43 Iowa, 24; *Garlick* v. *Mississippi Valley Ins. Co.* (1876) 44 Iowa, 553; *Continental Ins. Co.* v. *Daly* (1885) 33 Kan. 601, 7 Pac. 158; *Hodge* v. *Continental Ins. Co.* (1890) 12 Ky. L. Rep. 138; *Potter* v. *Continental Ins. Co.* (1899) 107 Ky. 326, 53 S. W. 669; *Robinson* v. *Continental Ins. Co.* (1889) 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647; *Barnes* v. *Continental Ins. Co.* (1888) 30 Mo. App. 539; *Sauner* v. *Phœnix Ins. Co.* (1890) 41 Mo. App. 480; *Mooney* v. *Home Ins. Co.* (1897) 72 Mo. App. 92; *Phenix Ins. Co.* v. *Bachelder* (1891) 32 Neb. 490, 29 Am. St. Rep. 443, 42 N. W. 217; *Home F. Ins. Co.* v. *Garbacz* (1896) 48 Neb. 827, 67 N. W. 864; *Antes* v. *State Ins. Co.* (1900) 61 Neb. 55, 84 N. W. 412; *Houston* v. *Farmers' & M. Ins. Co.* (1902) 64 Neb. 138, 89 N. W. 635; *Hooker* v. *Continental Ins. Co.* (1903) 69 Neb. 754, 96 N. W. 663; *Wall* v. *Home Ins. Co.* (1867) 36 N. Y. 157; *McEvoy* v. *Michigan Mut. L. Ins. Co.* (1888) 2 Ohio C. D. 329; *St. Paul F. & M.*

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Ins. Co. v. *Cooper* (1909) 25 Okla. 38, 105 Pac. 198; *Dale* v. *Continental Ins. Co.* (1895) 95 Tenn. 38, 31 S. W. 266; *Gleason* v. *Prudential F. Ins. Co.* (1912) 127 Tenn. 8, 151 S. W. 1030; *East Texas F. Ins. Co.* v. *Perky* (1893) 5 Tex. Civ. App. 698, 24 S. W. 1080; *Proebstel* v. *State Ins. Co.* (1896) 14 Wash. 669, 45 Pac. 308; *Gorton* v. *Dodge County Mut. Ins. Co.* (1875) 39 Wis. 121.

The effect of a provision in a policy that the insurer shall not be liable for any loss occurring when a note given for the premium is due and unpaid is not avoided by the fact that the note stipulates for interest after maturity, such stipulation not having the effect of waiving payment at maturity or of extending further credit. *Watrous* v. *Mississippi Valley Ins. Co.* (1872) 35 Iowa, 582.

Where a policy of insurance recognizes that the time of payment of premiums may be extended by the giving of notes, and that such notes shall be deemed not payment but only extensions, "and if any such note or any renewal thereof shall not be fully paid when due, then for any loss occurring while such note or other obligation remains due and unpaid the company shall not be liable," the insured has the right to reinstate his policy by paying such note at any time after it is due and before loss (*Guetzkow* v. *Michigan Mut. L. Ins. Co.* (1900) 105 Wis. 448, 81 N. W. 652); since it is only if payment is deferred until after loss that the contract stipulates against liability; and it is sufficient that a tender is made before the loss actually occurs (*Continental Ins. Co.* v. *Miller* (1891) 4 Ind. App. 553, 30 N. E. 718).

Where the application for insurance contained the agreement, expressed to be in consideration of the acceptance of the application and the expense incurred in connection therewith, that if any note given for the first or any subsequent premium or any part thereof be not paid when due the policy will cease to be in force, but nevertheless the liability to pay such note shall continue and be enforceable, and the policy was in force up to the time of the maturity of the note, a payment of the note cannot be resisted on the ground of a want or failure of consideration. *Home Life Asso.* v. *Walsh* (1903) 36 N. S. 73.

See also, as to existence of such a stipulation as affecting consideration for note, *Crawford* v. *Sipprell* (1901) 35 N. B. 344, under II. b, *supra*.

Where it is stipulated in a policy that if a note shall be accepted for a premium a failure to pay the note at maturity shall terminate the insurance, a failure to pay at maturity a note given for the premium will work the forfeiture of the insurance. *Sullivan* v. *Connecticut Indemnity Asso.* (1897) 101 Ga. 809, 29 S. E. 41; *National Life Asso.* v. *Brown* (1898) 103 Ga. 382, 29 S. E. 928; *Stephenson*

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v. *Empire L. Ins. Co.* (1912) 139 Ga. 82, 76 S. E. 592; *Reed* v. *Bankers' Reserve L. Ins. Co.* (1911) 192 Fed. 408.

Where a policy of life insurance and each of the notes taken by the insurer for the initial premium provide that if any obligation given for premiums should be dishonored or not paid when due the policy shall be void until duly reinstated during the lifetime and good health of the insured, the policy becomes void upon the failure to pay a note given for a premium. *Hipp* v. *Fidelity Mut. L. Ins. Co.* (1907) 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892.

Where a policy provides that if premium notes are given and are not paid the policy shall become void, it is a good defense to an action on the policy that the premium notes were unpaid at the time of the loss. *American Ins. Co.* v. *Leonard* (1881) 80 Ind. 272; *Continental Ins. Co.* v. *Dorman* (1890) 125 Ind. 189, 25 N. E. 213; *Forbes* v. *Union Cent. L. Ins. Co.* (1898) 151 Ind. 89, 51 N. E. 84.

Where a policy provides that a failure to pay at maturity a note given for premium shall avoid the policy, default in payment, even in case part of the premium is paid in cash and a note given for the balance only, destroys all right of recovery upon the policy. *Hudson* v. *Knickerbocker L. Ins. Co.* (1877) 28 N. J. Eq. 167.

Where one insured under a policy which by its terms becomes forfeited upon nonpayment of any premium gives a note for a portion of a premium which recites that it is accepted by the insurer at the request of the maker, together with the cash payment, on the express agreement that although no part of the premium due on the policy has been paid, the insurance thereunder shall be continued in force until the maturity of said note; that if the note is paid on or before the date it becomes due such payment will then be accepted by the insurer as payment of the premium, and all rights under the policy shall thereupon be the same as if the premium had been paid when due; that if the note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and all rights under said policy shall be the same as if said agreement had not been made,—a failure to pay the note when due terminates the insurance. *White* v. *New York L. Ins. Co.* (1909) 200 Mass. 510, 86 N. E. 928.

Where both the policy and the premium note provide that a failure to pay the note at maturity will render the contract void, and the receipt given by the insurer declares that it is subject to the conditions of any note which may have been given, the nonpayment of the note at maturity will work a forfeiture. *Parry* v. *Southeastern L. Ins. Co.* (1913) 95 S. C. 1, 78 S. E. 441.

The nonpayment of a note executed for the first premium of a life insurance policy, the payment of which note is under the policy a condition precedent to the life thereof, will defeat recovery thereon.

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Union Cent. L. Ins. Co. v. *Hughes* (1902) — Tex. Civ. App. —, 70 S. W. 1010; *National L. Ins. Co.* v. *Reppond* (1904) — Tex. Civ. App. —, 81 S. W. 1012.

A general custom of the insurance company not to treat policies as forfeited by nonpayment of premium notes at maturity will not have the effect to overturn or supersede the written terms of the particular contract entered into by the party. *Union Cent. L. Ins. Co.* v. *Chowning* (1894) 8 Tex. Civ. App. 455, 28 S. W. 117; but compare IV. i, 2, post.

A policy terminable by failure "to pay when due any notes or other obligations given for a premium" is determined by failure to pay an instalment due on a premium note. *Pitt* v. *Berkshire L. Ins. Co.* (1868) 100 Mass. 500.

In *Frank* v. *Sun Life Assur. Co.* (1893) 20 Ont. App. Rep. 564, affirmed without opinion in 23 Can. S. C. 152, note, it was held that although there was no condition, stipulation, or proviso within the body of the policy or referred to therein expressly avoiding it if the premiums should not be paid at the day named, or if a note taken for the premiums should not be paid when due, the effect of a failure to comply with a condition contained in each of two notes given for the initial premium, that if not paid at maturity any policy for the insurance that might in the meantime be issued by the company should be null and void, but that the note should nevertheless be paid, by failing to pay of the note first to become due, was to terminate the insurance, though the time for the payment of the other note had not yet arrived at the date of the death of the insured.

In *Anchor M. Ins. Co.* v. *Corbett* (1881) 9 Can. S. C. 73, where an insurance policy provided that should the person or persons liable to the company for the premium, or on any note or obligation therefor, fail in business, or become bankrupt or insolvent before the time for payment should arrive, the insurance should at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company, and the insured, before maturity of a note given for a premium, became insolvent and a guaranty was given by the assignee of the insolvent estate and accepted as a satisfactory security for the premium, it was held that the policy was thereby kept in force and effect though the note was not paid at maturity, and though the policy also provided that in case of nonpayment at maturity of a note given for a premium the insurance should be void, but the full amount of the premium should be considered as earned and should be payable; the two provisions being regarded as not having concurrent operation.

b. Where note not due at time of loss.

An insurer cannot set up as a defense to an action on the policy

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a provision therein that if any note given for a premium should not be paid at maturity the full amount of the premium should be considered earned, and that the policy should become void while the note remained so unpaid, where the note so due at the time of the commencement of the suit was not shown to have been due at the time of the loss, and the policy also provides that the premium note in case of loss shall be deducted before payment of the amount insured. *Meagher* v. *Home Ins. Co.* (1860) 10 U. C. C. P. 313; *Meagher* v. *Ætna Ins. Co.* (1860) 19 U. C. Q. B. 530.

A stipulation in a policy of fire insurance that it should be suspended and rendered inoperative during the time the premium note or any part thereof should remain overdue and unpaid does not preclude a recovery on the policy where the note was not due at the time the loss occurred. *Farmers' & M. Ins. Co.* v. *Wiard* (1899) 59 Neb. 451, 81 N. W. 312.

As to liability of insurer for loss occurring after default in payment of one note but before the other is due, see *Frank* v. *Sun Life Assur Co.* (1893) 20 Ont. App. Rep. 564, under IV. a, supra.

c. As applying to notes of third party.

Nonpayment of the note of a husband, accepted by the insurer in payment of premiums on a policy on his life issued to his wife, in exchange for which renewal receipts were given, will not avoid the policy by operation of the provision therein that if the premium shall not be paid when due the insurer shall not be liable for the payment of the sum insured. *Michigan Mut. L. Ins. Co.* v. *Bowes* (1879) 42 Mich. 19, 51 N. W. 962; *Tabor* v. *Michigan Mut. L. Ins. Co.* (1880) 44 Mich. 324, 6 N. W. 830.

So, also, in *Galvin* v. *Union Cent. L. Ins. Co.* (1903) 115 Ky. 547, 103 Am. St. Rep. 336, 74 S. W. 275, it was held that a provision of an insurance policy that it should be void in case of failure to pay any note given for any premium on or before the days upon which they become due cannot be construed to refer to notes executed by a third party, though expressed to be for the premium.

Where the notes of a husband are accepted in payment of the premium on a policy of fire insurance issued to his wife, a stipulation in such notes that "my insurance" shall be null and void as long as the notes remain past due and unpaid will not have the effect to avoid the policy. *Home F. Ins. Co.* v. *Stancell* (1910) 94 Ark. 578, 127 S. W. 966.

But see in this connection *Timayenis* v. *Union Mut. L. Ins. Co.* (1884) 22 Blatchf. 405, 21 Fed. 223, under II. a, supra.

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d. As applying to notes given to agents personally.

Stipulations of the kind under consideration relate to notes given to the insurer, and do not apply in the case of a note taken by an agent personally, who either remits the amount of the premium to the insurer or renders himself personally liable therefor. *Williams* v. *Empire Mut. Annuity & L. Ins. Co.* (1910) 8 Ga. App. 303, 68 S. E. 1082; *Devine* v. *Federal L. Ins. Co.* (1911) 250 Ill. 203, 95 N. E. 174; *Southern Mut. L. Ins. Co.* v. *Best* (1886) 8 Ky. L. Rep. 535; *Mooney* v. *Home Ins. Co.* (1899) 80 Mo. App. 192; *Union L. Ins. Co.* v. *Parker* (1902) 66 Neb. 395, 62 L.R.A. 390, 103 Am. St. Rep. 714, 92 N. W. 604; *Perea* v. *State L. Ins. Co.* (1910) 15 N. M. 399, 110 Pac. 559; *Reppond* v. *National L. Ins. Co.* (1907) 100 Tex. 519, 11 L.R.A.(N.S.) 981, 101 S. W. 786, 15 Ann. Cas. 618; *Thies* v. *Mutual L. Ins. Co.* (1896) 13 Tex. Civ. App. 280, 35 S. W. 676.

However, in *Mooney* v. *Home Ins. Co.* (1897) 72 Mo. App. 92, the court expressed a willingness to hold that a provision that the insurer should not be liable for any loss or damage that might occur to the property insured while any note given for the whole or any portion of the premium remains past due and unpaid applies in the case of a note given to an agent, saying: "It might be well said . . . that it is of no consequence whether the proceeds of the $14 note and the whole title and interest therein belonged to Cowhic, the agent, or to the defendant company, since it is clear that it was given for and on account of the acknowledged cash payment, or first year's premium, and the clause in the application and policy applies as well and in effect declares that if the plaintiff failed to pay the same promptly at maturity then the policy should become void. Under the terms of the contract the policy was to become inoperative and of no force if the plaintiff failed to pay such note whether the same be the property of the insurer or its agent. This forfeiture clause was clearly intended to work as a security for the prompt payment of the premium or the note given therefor. It may have been equally the desire and intent of the company to protect the agent as well as itself." But as the proof showed that the note, though payable to the agent, was in fact the property of the insurer, and had been so treated by the parties, the necessity for so holding did not arise.

In *Hooker* v. *Continental Ins. Co.* (1903) 69 Neb. 754, 96 N. W. 663, a note, although on its face made payable to an agent, was, in view of the fact that by the dealings of the parties it had been treated as in fact the property of the insurance company, held to be one a default in payment of which would, under its terms and the terms of the policy, suspend the insurance during the time it remained overdue and unpaid.

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e. As affecting rights of beneficiary.

It has been held that the giving of a note by the insured for a premium, and the acceptance of such note by the insurer, is equivalent to a cash payment, and default in the payment of such note at maturity will not, so far as a beneficiary having a vested interest in the contract of insurance is concerned, work a forfeiture of the policy, notwithstanding the renewal receipt provides for a forfeiture of the policy if the note is not paid at maturity, where the original contract of insurance simply provides that if the premium is not paid at maturity the policy shall be avoided, but contains no such stipulation as is embodied in the receipt. *Arnold* v. *Empire Mut. Annuity & L. Ins. Co.* (1907) 3 Ga. App. 685, 60 S. E. 470, in which the court said: "In considering the effect of the nonpayment of a note taken for the payment of a premium, as a separate contract apart from the policy, it is to be borne in mind that the payment of the first premium completes the contract of insurance; that the contract of insurance is not for one year, but for the life of the insured or a term of years; that the insurance company has the right to take notes (either the notes of the assured or of any other person) in payment of annual premiums; that the company can, at its pleasure, include or omit from the contract of insurance which it prepares and proposes a stipulation providing for a forfeiture of the policy upon the nonpayment of such notes, but that after all, the payment of the annual premium, after the first premium is paid, is a condition subsequent the nonperformance of which may or may not, according to circumstances, work a forfeiture of the policy."

So, the rights of the beneficiary of an insurance policy are not affected by the nonpayment of an order given in part payment of the premium, although such order provides that if it is not paid, then all the rights of the insured shall be forfeited. *Kline* v. *National Ben. Asso.* (1887) 111 Ind. 462, 60 Am. Rep. 703, 11 N. E. 620.

The rights of the beneficiaries of a policy of life insurance which acknowledges payment and receipt of the advance premium are not affected by an agreement of the assured, not referred to either in the note or the policy, that if he should not pay the note executed for the premium when due he would surrender the policy. *Trager* v. *Louisiana Equitable L. Ins. Co.* (1879) 31 La. Ann. 235.

In *Union Cent. L. Ins. Co.* v. *Buxer* (1900) 62 Ohio St. 385, 49 L.R.A. 737, 57 N. E. 66, it was held that where a husband procures insurance on his life payable to himself after a term of years if he shall live so long, and, if not, then to his wife at his death, and after paying premiums for some years gives a premium note, which has a forfeiture clause therein more onerous, as against the interests of the wife, than the forfeiture clause in the policy, such forfeiture

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clause in the note will not avail the insurance company as against the wife, unless she assents thereto.

But where the policy itself and the note given for the initial premium provide that upon failure of the insured to pay such note at maturity the policy shall be null and void without action on the part of the insurer or notice to the assured or beneficiary, and the receipt given for the initial premium is expressed to be subject to the conditions of any and all notes which may have been given or may be given for the amount of said premium, failure to pay the note at maturity will preclude the beneficiary from enforcing the policy. *Fenn* v. *Union Cent. L. Ins. Co.* (1896) 48 La. Ann. 541, 19 So. 623.

In *Security Life & Annuity Co.* v. *Underwood* (1912) — Tex. Civ. App. —, 150 S. W. 293, it is held that the fact that the policy itself did not in express terms provide for forfeiture for failure to pay notes given for premiums did not preclude the insurer from claiming, as against a beneficiary having a vested interest, the benefit of a forfeiture clause in a note and receipt, where the policy contained a provision that at the death of the insured, "all premiums and indebtedness hereon having been fully paid," the amount of the policy will be paid to the beneficiary. The court, although relying upon this clause in the policy as distinguishing the case from *Arnold* v. *Empire Mut. Annuity & L. Ins. Co. supra*, and *Mutual L. Ins. Co.* v. *French* (1876) 30 Ohio St. 240, 27 Am. Rep. 443, intimates its disapproval of the conclusion reached therein.

f. As affecting rights of assignee of policy.

A receipt given at the time of taking a note for a premium, for the amount of the premium, but bearing the words, "paid by note in terms thereof," does not estop the insurer, as against an assignee of the policy for value with the assent of the company during the currency of the note, from claiming the benefit of a provision in the policy and note that if such a note should not be paid at maturity the policy should forthwith become void. *Wood* v. *Confederation L. Ins. Co.* (1901) 2 N. B. Eq. Rep. 217.

g. Necessity for presentment, demand, or protest.

Where a policy provides that failure to pay at maturity any note given for premium shall then and thereafter cause the policy to be void without notice to any party or parties interested therein, and a note given for premiums stipulates that the policy is to be void in case the note is not paid at maturity, it is not necessary for the insurer to demand payment of the note—at least where the note states no place of payment—in order to forfeit the policy. *Roehner* v. *Knickerbocker L. Ins. Co.* (1875) 63 N. Y. 160.

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See also *Behling* v. *Northwestern Nat. L. Ins. Co.* (1903) 117 Wis. 24, 93 N. W. 800, *ubi supra.*

No demand for the payment of the note is necessary to enable the insurer to avail itself of a provision in the policy, if any premium shall be settled wholly or in part by note or other obligation, such settlement shall not be deemed a payment but only an extension of the time of payment of such premium, and if such note shall not be fully paid when due, then for any loss occurring while such note remains due and unpaid the company shall not be liable. *McEvoy* v. *Michigan Mut. L. Ins. Co.* (1888) 2 Ohio C. D. 329.

But in *Roehner* v. *Knickerbocker L. Ins. Co. supra,* the court intimated that where an ordinary promissory note is taken for a premium it may be that the insurer should signify an election to the insured to forfeit the policy on account of nonpayment of the note at maturity, by a demand of payment of the note or by some other notice of its determination.

In *Frank* v. *Sun Life Assur. Co.* (1893) 20 Ont. App. Rep. 564, affirmed without opinion in 23 Can. S. C. 152, note, it was held that a provision in a note given for an initial premium on a policy of life insurance that if it should not be paid at maturity the policy should be null and void, but that the note should nevertheless be paid, was self-executing, and that a demand for payment of the note at maturity was not necessary to complete the right of the insurer to forfeit the policy.

But a note executed for the premium, payable on demand, cannot be regarded as matured except by a demand of payment from the maker, for the purpose of a forfeiture under a provision of the policy that if any note given for premium shall not be paid on or before the date specified for the payment of the same, the policy shall cease and determine. *Travelers' Ins. Co.* v. *Pulling* (1896) 159 Ill. 603, 43 N. E. 762.

In *Knickerbocker L. Ins. Co.* v. *Pendleton* (1885) 112 U. S. 696, 29 L. ed. 866, 5 Sup. Ct. Rep. 314, where a policy of life insurance was conditioned to be void if the annual premium or any obligation given in payment thereof should not be paid at maturity, and the annual premium was paid by a foreign bill drawn by the party insured, with a condition that if not paid at maturity the policy should be void, it was held that a forfeiture was incurred by nonpayment of the bill upon presentment at maturity, without protest for nonpayment, although protest might be necessary to fix the liability of the drawer; but that the presentment and nonacceptance of the bill before maturity without protest did not dispense with the presentment for payment in order to produce the forfeiture.

Usage on the part of the insurance company of giving notice of the day of payment, and the reliance of the assured upon having such

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notice, is no excuse for nonpayment of a note given for a premium whereby a forfeiture is incurred. *Thompson* v. *Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765.

h. Necessity of affirmative action in order to forfeit policy.

1. Generally.

Ordinarily, although not invariably, as will hereafter appear, a stipulation suspending or avoiding the policy in event of the nonpayment of a premium note at maturity is regarded as self-executing, *i. e.*, as effecting a suspension or forfeiture without further notice to the insurer. That it so operates is held in the following cases:

— *Fidelity Mut. L. Ins. Co.* v. *Bussell* (1905) 75 Ark. 25, 86 S. W. 814, where the note contained a stipulation that if not paid when due the policy should be "*ipso facto* null and void, without notice to the maker hereof and without any act on the part of the company, and shall remain so until restored as provided by its terms;"

—*Bennett* v. *Union Cent. L. Ins. Co.* (1902) 104 Ill. App. 402, (reversed on other grounds in 203 Ill. 439, 67 N. E. 971) where the policy provided that failure to pay any note given for any premium on or before maturity "shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary;"

— *Manhattan L. Ins. Co.* v. *Savage* (1901) 23 Ky. L. Rep. 483, 63 S. W. 278, where both the policy and the premium note provided for a forfeiture for nonpayment of the note or any premium;

— *Franklin L. Ins. Co.* v. *McAfee* (1906) 28 Ky. L. Rep. 676, 90 S. W. 216, where the policy provided that it should be void by reason of the nonpayment of any note executed for a premium thereon;

— *Seeley* v. *Union Cent. L. Ins. Co.* (1899) 10 Pa. Super. Ct. 270; *Union Cent. L. Ins. Co.* v. *Chowning* (1894) 8 Tex. Civ. App. 455, 28 S. W. 117, where both the policy and the note given for the premium expressly provided that in case of nonpayment of the note at maturity the insurance should become null and void "without notice to any party or parties interested therein;"

— *Security Life & Annuity Co.* v. *Underwood* (1912) — Tex. Civ. App. —, 150 S. W. 293, where the note given for a premium and the receipt thereupon given provided that upon default in payment of the note all rights and benefits secured by the policy shall cease and determine without notice, and the policy shall be *ipso facto* null and void except as otherwise provided therein;

— *Iowa L. Ins. Co.* v. *Lewis* (1902) 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 1267, where a note given for the payment of the

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premium which was accepted on the condition that if not paid at maturity the policy shall "cease and determine;"

—*McGeachie* v. *North American Life Assur. Co.* (1893) 20 Ont. App. Rep. 187 (reversing 22 Ont. Rep. 151, and itself affirmed on other grounds in 23 Can. S. C. 148), where the policy contained a condition that if any note given for a premium should not be paid at maturity the policy should be void, but the note should nevertheless be payable.

So, also, it has been held that where a policy provides that if any premium is not paid on or before the day when due, the policy shall become void, and a note given in part payment of a premium stipulates that it is given with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of such premium would have secured shall become immediately void if the note is not paid at maturity, and the renewal receipt contemporaneously given continues the policy in force only upon condition that the note is paid at maturity, the policy becomes void without any declaration of forfeiture. *Banholzer* v. *New York L. Ins. Co.* (1898) 74 Minn. 387, 77 N. W. 285, 78 N. W. 244, 84 N. W. 1115.

Where the policy clearly provides that a failure to pay when due "any money required to be paid" shall render the policy *ipso facto* null and void, and a note executed by the assured for a premium shows the purpose for which it was given and expressly recites that if it is not paid at maturity the policy shall become *ipso facto* null and void, and that the amount of the note shall be an absolute liability, the contract cannot be construed as providing merely an option of forfeiture to be exercised or not by the insurance company upon the failure of the assured to pay the premium money when due, but must be taken as providing for an absolute forfeiture of the policy upon such contingency. *Laughlin* v. *Fidelity Mut. Life Asso.* (1894) 8 Tex. Civ. App. 448, 28 S. W. 411.

Under the provision of a policy that failure to pay when due any note given on account of premiums shall cancel the insurance and terminate the policy, and the terms of a note given for a premium which provides that if the note is unpaid at maturity the policy shall cease and determine in accordance with its terms, and the whole amount of the note shall be considered earned and shall be collectable by the insurer without restoration of the policy, a failure to pay such a note at maturity *ipso facto* puts an end to the insurance. *National L. Ins. Co.* v. *Manning* (1905) 38 Tex. Civ. App. 498, 86 S. W. 618.

Where the note provides that it is to be accounted simply as an extension of time for payment of the premium, and that if not paid at maturity, with interest, all liability under the policy by reason of the note shall cease, and the application for the policy contains

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a similar agreement on the part of the insured as to any note or obligation given for premiums, and the policy declares that it is issued in consideration of the declarations, answers, and agreements made in the application and of the payment of the premium each year, and that a failure to make such premium payment shall work a forfeiture of all insurance and right under the policy, no affirmative action on the part of the insurer is necessary to terminate its liability upon a failure to pay a premium note at maturity. *Rhodes* v. *Royal Union Mut. L. Ins. Co.* (1914) 56 Pa. Super. Ct. 233.

To agree that all liability under the policy shall cease, or that the policy shall cease and determine, is quite as effective as to agree that the policy shall become void; and where either of these forms of expression is used no affirmative action on the part of the insurer is necessary to give effect to the act or omission which it is agreed shall terminate its liability. *Ibid.*

Where an accident policy stipulates for the payment of premiums at intervals, and declares that the notes are for premiums for consecutive periods of time, and each applies only to its corresponding period, and the application recited that the insured agreed that the policy should embrace four separate contracts, and should not be in force after maturity of the first note except by actual payment of the first and succeeding premium notes at maturity in their consecutive order, and the several notes provided that if not paid at maturity the policy should then terminate, a failure to pay any one of such notes at maturity will put an end to the insurance without notice to the insured or any formal cancelation of the policy. *North American Acci. Ins. Co.* v. *Bowen* (1907) — Tex. Civ. App. —, 102 S. W. 163.

Where a note given for a premium upon a policy of insurance is made payable at a particular place, and it is stipulated in the contract that failure to pay the same according to its terms shall terminate the policy, it is sufficient to make the forfeiture clause operative to have the note at the place designated for payment at the proper time, so as to enable the assured to pay it if he desires to do so, and that there was a failure to make such payment. The policy being at an end by the happening of these events, the company owes no duty to the assured to give him any notice to that effect. *Behling* v. *Northwestern Nat. L. Ins. Co.* (1903) 117 Wis. 24, 93 N. W. 800.

But forfeiture of a policy for nonpayment of a premium note under a condition in the policy that it shall be void if any such note is not paid when due will be denied where the note had been laid away and forgotten by an agent of the company who had it for collection, and no notice had been given to the insured to pay it, as was customary in such cases. *Equitable Acci. Ins. Co.* v. *Van Etten* (1900) 40 Ill. App. 232.

Where the note stipulates that if not paid at maturity the insurer

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"shall have the right to cancel the policy," affirmative action is necessary to terminate the contract of insurance. *Western Horse & Cattle Ins. Co.* v. *Scheidle* (1885) 18 Neb. 495, 25 N. W. 620.

In *Travelers' F. Ins. Co.* v. *Mercer* (1912) 32 Okla. 503, 122 Pac. 134, it was held that where an application for insurance contained a clause providing that in case a note should be given for a premium, and should not be paid when due, it should work a forfeiture of the policy, but the policy of insurance later issued contained a provision in effect that when any premium has not been paid in cash the contract of insurance may be terminated on notice to the insured, the provision in the policy modified the forfeiture clause in the application to the extent that notice to the insured is necessary before a forfeiture can be declared.

And it has been held that although a policy provides that it shall become void in case a note given for the premium shall not be paid within fifteen days after maturity and demand, and remain void during the time the same shall be overdue and unpaid, the nonpayment of a premium note for fifteen days does not *ipso facto* render the policy void, but it rests with the insurer whether it will so treat it. *Louisville Underwriters* v. *Pence* (1892) 93 Ky. 96, 40 Am. St. Rep. 176, 19 S. W. 10.

Where a note contains a stipulation that if not paid at maturity the insurance shall not be binding upon the insurer while the note remains unpaid, the mere fact that the note was not paid at maturity does not of itself avoid the policy, but simply gives the insurer the option of declaring a forfeiture, which must be asserted by clear and unequivocal acts. Per Courtright, J., in charging jury in *Wilson* v. *Home Ins. Co.* (1879) 6 Ohio Dec. Reprint, 708.

Although a note given for an insurance premium provides that if not paid at maturity the policy shall become null and void, nonpayment at maturity does not *ipso facto* render either the note or policy void, but simply vests in the insurer the right to elect whether it will abandon the contract on account of the default, or waive the default and enforce the contract. *Montgomery* v. *Phœnix Mut. L. Ins. Co.* (1878) 14 Bush, 51.

In *Union Cent. L. Ins. Co.* v. *Zihlman* (1910) 68 W. Va. 272, 69 S. E. 855, it was held that a provision in a life insurance policy making it null and void without action on the part of the company in case of failure of the insured to pay any premium due thereunder or any note given for such premium is intended for the benefit of the insured, and makes the policy voidable only, on the happening of the contingency specified.

2. As affected by absence of stipulation in policy itself.

The contention has been advanced that where the stipulation that

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the insurance shall be forfeited or suspended in case of the nonpayment of a premium note at maturity forms no part of the original contract, but is found only in the note itself or the receipt issued therefor, it is in the nature of a condition subsequent (see *Columbian Nat. L. Ins. Co.* v. *Mulkey* (1913) 13 Ga. App. 508, 79 S. E. 482) of which the insurer must elect to take advantage in order to render it operative. As to the validity of this contention, opinions differ.

Thus it has been held that the failure to pay a promissory note taken in payment of an insurance premium (although it is stipulated in the note that the nonpayment of the same at maturity will avoid the policy) will not forfeit the policy where there is no condition in the policy itself providing for its forfeiture for the nonpayment of the note. *McGehee* v. *Rinker* (1911) 9 Ga. App. 147, 70 S. E. 962.

Notwithstanding a condition in a note given for an insurance premium that in case the note be not paid at or before maturity the policy shall at the time of maturity cease and determine, and be null and void and so remain until said note shall have been fully paid to the insurer as provided in the policy, nonpayment of the note at maturity will not avoid the policy where the policy itself does not stipulate for a forfeiture because of the nonpayment of the note, or even contain a condition that the policy shall not take effect or the risk attach until the premium is paid. *Dwelling House Ins. Co.* v. *Hardie* (1887) 37 Kan. 674, 16 Pac. 92.

In *Ressler* v. *Fidelity Mut. L. Ins. Co.* (1903) 110 Tenn. 411, 75 S. W. 735, it was said with reference to the case of *Dwelling House Ins. Co.* v. *Hardie, supra,* that the court makes that case turn upon a peculiarity of the phrase contained in the provision in the note that upon the failure to pay this obligation the risk should determine "as provided in the policy," coupled with the failure of the policy to provide for such determination.

A provision in notes given for the premium on a policy of fire insurance that if they are not paid at maturity "the whole amount of the premium shall be considered earned, and all notes given in settlement of said policy be due, and the policy be null and void and so remain until the same shall be fully paid and the policy be reinstated by the company," does not render the policy void until the insurer has by affirmative action declared the policy forfeited. *Shawnee Mut. F. Ins. Co.* v. *Cannedy* (1912) 36 Okla. 733, 44 L.R.A. (N.S.) 376, 129 Pac. 865.

In *Mutual L. Ins. Co.* v. *French* (1876) 30 Ohio St. 240, 27 Am. Rep. 443, where a policy contained the usual clause of forfeiture for nonpayment of premiums but no clause of avoidance for the nonpayment of notes given for premiums, and a note given for part of a premium stipulated that if it should not be paid at maturity, the

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policy should be null and void, it was held that the mere fact that the note was not paid at maturity did not of itself avoid the policy, but merely gave the insurer the option of declaring a forfeiture, which option must be asserted by clear and unequivocal acts.

And see also, to the same effect, *Union Cent. L. Ins. Co.* v. *Morrow* (1897) 7 Ohio S. & C. P. Dec. 122.

In *Hastings* v. *Brooklyn L. Ins. Co.* (1893) 138 N. Y. 473, 34 N. E. 289, where notwithstanding the note given for the amount of a premium contained a provision pledging the policy as security for its payment, and that in case of nonpayment when due the policy should become null and void, it was said that the act of insurer in extending credit to the insured for premiums falling due upon pledge of the policy established a course of dealing between the parties which it was necessary to terminate in some way before the policy could be treated as forfeited and void.

On the other hand, in *Ressler* v. *Fidelity Mut. L. Ins. Co. supra*, it was held that where a note given for a premium contained a provision that in the event it should not be paid at maturity, the policy in question "should be *ipso facto* null and void without notice to the maker, and without any act on the part of the company," and should "remain so until reinstated as provided by its terms," and the receipt contemporaneously given to the assured contained the words, "it is understood and agreed that a protested check or past-due note or obligation of any kind is not payment, and that any obligation given in exchange for this receipt when dishonored, or not paid at maturity, shall render the receipt and said policy absolutely void," nonpayment of the premium note had the effect to forfeit the policy, though the policy contained no stipulation to that effect. This decision is put on the ground that as it is the right of the insurer under the policy to receive a punctual payment of the premiums in cash, and as it may waive such right *pro tanto* by acceptance of a note, the condition in the note operating to defeat the policy is not an inconsistent condition subsequent, contained in a mere collateral agreement,—citing and distinguishing *Dwelling House Ins. Co.* v. *Hardie* (1887) 37 Kan. 674, 16 Pac. 92; *McAllister* v. *New England Mut. L. Ins. Co.* (1869) 101 Mass. 558, 3 Am. Rep. 404; *Trade Ins. Co.* v. *Barracliff* (1883) 45 N. J. L. 543, 46 Am. Rep. 792; *Fithian* v. *Northwestern L. Ins. Co.* (1877) 4 Mo. App. 386; and disapproving the case of *Mutual L. Ins. Co.* v. *French* (1876) 30 Ohio St. 240, 27 Am. Rep. 443.

Where a policy provides that it shall be void if any annual premium is not paid when due, and the insurer accepts notes in payment of the premium upon the express agreement that if a default is made in the payment of the note the policy shall then cease, and the insurer afterwards notifies the insured that the validity of his in-

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surance depends upon his prompt attention to the payment of his note, no further notice is necessary to enable the insurer to declare the contract forfeited. *Manhattan L. Ins. Co.* v. *Pentecost* (1899) 105 Ky. 642, 49 S. W. 425.

See also *Security Life & Annuity Co.* v. *Underwood* (1912) — Tex. Civ. App. —, 150 S. W. 293, under IV. d, *supra*.

i. Waiver of forfeiture, or estoppel to assert it.

1. Generally.

A condition in an insurance policy that in case of default in the payment of any note given for premiums the insurer shall not be liable for any loss occurring during the continuance of such default (*Smith* v. *St. Paul F. & M. Ins. Co.* (1882) 3 Dak. 80, 13 N. W. 355; *Phœnix Ins. Co.* v. *Tomlinson* (1890) 125 Ind. 84, 9 L.R.A. 317, 21 Am. St. Rep. 203, 25 N. E. 126; *Michigan Mut. L. Ins. Co.* v. *Custer* (1890) 128 Ind. 25, 27 N. E. 124; *Phenix Ins. Co.* v. *Rollins* (1895) 44 Neb. 745, 63 N. W. 46; *Phenix Ins. Co.* v. *Bachelder* (1891) 32 Neb. 490, 29 Am. St. Rep. 443, 49 N. W. 217; *St. Paul F. & M. Ins. Co.* v. *Cooper* (1909) 25 Okla. 38, 105 Pac. 198; *East Texas F. Ins. Co.* v. *Perky* (1893) 5 Tex. Civ. App. 698, 24 S. W. 1080; *Joliffe* v. *Madison Mut. Ins. Co.* (1875) 30 Wis. 115, 20 Am. Rep. 35), or that the policy shall lapse by reason of the failure of the insured to pay such a note at maturity (*Washburn* v. *Union Cent. L. Ins. Co.* (1904) 143 Ala. 485, 38 So. 1011; *Occidental L. Ins. Co.* v. *Jacobson* (1914) 15 Ariz. 242, 137 Pac. 869; *Bennett* v. *Union Cent. L. Ins. Co.* (1903) 203 Ill. 439, 67 N. E. 971; *Union Cent. L. Ins. Co.* v. *Woods* (1894) 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Majestic Life Assur. Co.* v. *Tuttle* (1914) — Ind. App. —, 107 N. E. 22; *Montgomery* v. *Phenix Mut. L. Ins. Co.* (1878) 14 Bush, 51; *New York L. Ins. Co.* v. *Evans* (1910) 136 Ky. 391, 124 S. W. 376; *Murphy* v. *Lafayette Mut. L. Ins. Co.* (1914) 167 N. C. 334, 83 S. E. 461; *Parker* v. *Simpson* (1907) 56 Misc. 537, 107 N. Y. Supp. 199; *Union Cent. L. Ins. Co.* v. *Zihlman* (1910) 68 W. Va. 272, 69 S. E. 855), is one for the benefit of the insurer, and is therefore one which it may waive, even though it operates automatically (*Galliher* v. *State Mut. L. Ins. Co.* (1907) 150 Ala. 543, 124 Am. St. Rep. 83, 43 So. 833); and this waiver may be indicated by conduct as well as by express language.

Where a condition is one for the benefit of the insurer and which he may waive, no consideration is necessary to support such waiver. *Washburn* v. *Union Cent. L. Ins. Co.* (1904) 143 Ala. 485, 38 So. 1011.

Such a waiver will be considered established, and the forfeiture prevented, whenever it is shown that there has been a valid agree-

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ment to postpone payment, or that the company has so far recognized an agreement to that effect, or otherwise acted in reference to the matter as to induce the policy holder in the exercise of reasonable business prudence to believe that prompt payment is not expected and that the forfeiture on that account will not be insisted on. *Murphy* v. *Lafayette Mut. L. Ins. Co.* (1914) 167 N. C. 334, 83 S. E. 461.

An insurer who has agreed to keep the policy alive notwithstanding any failure to meet premium notes at maturity is estopped from availing itself of a provision exonerating it from liability for any loss occurring while any such note should remain due and unpaid. *Continental Ins. Co.* v. *Browning* (1902) 114 Ky. 183, 70 S. W. 660.

A forfeiture for nonpayment of a premium note at maturity is waived by failure on the part of the insurer to notify the insured of the amount of the dividend to which he has become entitled prior to the maturity of the note, to the end that he may know the amount which he is required to pay. *Reed* v. *Bankers' Reserve L. Ins. Co.* (1911) 192 Fed. 408.

The delivery of the policy and the taking of a note for a portion of the first premium does not amount to a waiver of a provision of the policy that insurer shall not be liable for any loss or damage that may occur to the property insured while any note given for the whole or any portion of the premium remains past due and unpaid. *Mooney* v. *Home Ins. Co.* (1897) 72 Mo. App. 92.

In *Citizens' Nat. L. Ins. Co.* v. *Morris* (1912) 104 Ark. 288, 148 S. W. 1019, it was held that there was no waiver on the part of the insurer, of a provision of the policy that unless the premium should be paid when due the policy should cease and determine, where there was nothing in its communications with the insured to lead him to believe that without the payment of his premium notes at maturity his policy would be kept alive one moment, but, on the contrary, the undisputed evidence showed that the company advised him that the payment of the premium at the time specified for such payment was essential to the life of the policy, and in the letters written him after the time for payment had expired they notified him that the policy had lapsed, but would be reinstated, and continued with an extension of time for the payment of the premium note to a day certain, upon a certificate of good health.

Where the agent at the time of the taking out of the policy agreed that the company would give notice in advance of the maturity of a note given for a portion of the premium, the company, having failed to do so, cannot be heard to insist upon a forfeiture of the policy by reason of nonpayment of the note on the day it fell due. *Gleason* v. *Prudential F. Ins. Co.* (1912) 127 Tenn. 8, 151 S. W. 1030.

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But in *Robinson* v. *Continental Ins. Co.* (1889) 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647, it is held that the effect of a condition in an insurance policy that no liability shall exist while any part of a premium note is due and unpaid cannot be avoided by an oral statement of the agent that the insured would be notified when to pay, and by a custom of the company to give notice when and where to pay, where by the terms of the policy itself the note is payable at the company's offices or to any authorized person having it in his possession for collection.

Where the insured was induced to abstain from paying the premium note by reason of the company, through its agent, saying that the policy was then void by reason of the carrying of the balance of a former premium note into the next quarter's note, the company is estopped from setting up the nonpayment of the note when it was due, or availing itself of the condition contained in the note vitiating the policy. *Capital Life Assur. Co.* v. *Parker* (1915) 51 Can. S. C. 462, affirming 48 N. S. 404, 22 D. L. R. 325.

Where the effect of nonpayment of a premium note at maturity is to suspend the policy, which may, however, by subsequent payment be reinstated for the balance of the term, the failure of the insurer to reply to a letter from the insured stating an intention to remit as soon as they could sell some cotton and lumber cannot be considered as a waiver, although a prompt reply declining any indulgence would have enabled the insured to have forwarded the premium in time. *Dale* v. *Continental Ins. Co.* (1895) 95 Tenn. 38, 31 S. W. 266.

The insurer is estopped from denying liability by virtue of a provision in the policy that it shall not be liable for any loss or damage that may occur to the property insured while any promissory note or obligation given for the premium remains past due and unpaid, where prior to the loss the insured had called upon an agent of the company, to whom the note had been intrusted for collection, and offered to pay the money, but the agent told him, by mistake, that he did not have the note. *Continental Ins. Co.* v. *Miller* (1891) 4 Ind. App. 553, 30 N. E. 718.

In *German Ins. Co.* v. *Miller* (1890) 11 Ky. L. Rep. 721, it was held that the failure of the insured, an ignorant negro, to pay a premium note, brought about by the concealment of one agent as to the place of payment, and by the assurance of another agent that he would get the note so that it could be paid, cannot be considered such a failure as the policy intended should work a forfeiture.

The authority of an agent of an insurance company to waive a forfeiture which has accrued by reason of nonpayment of a premium note at maturity cannot be inferred from the act of the company in sending such note to the agent for collection some time before it was due,—especially where his contract with the company and the

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provisions of the policy prohibited the exercise of such authority. *Iowa L. Ins. Co.* v. *Lewis* (1902) 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

An agreement on the part of the insurance agent that if the insured cannot pay his premium note when due the agent will make good to the company the premium in case of loss, does not have the effect of avoiding the written stipulations of a policy providing for a forfeiture in case of default in the payment of a premium note, as such agreement is an individual undertaking on the part of the agent, not binding upon the insurer, as the terms of the written contract of insurance cannot be varied by proof of oral negotiation, and as the policy expressly stipulated that the insurer should not be bound by any act or statement made to or by the agent unless inserted in the contract. *Dircks* v. *German Ins. Co.* (1889) 34 Mo. App. 31.

2. By usage of insurer.

In *McCraw* v. *Old North State Ins. Co.* (1878) 78 N. C. 149, it was said that it cannot be doubted that if an insurer intentionally, by language or conduct, leads its policy holders to believe that they need not pay their premium notes promptly, and that no advantage will be taken of the failure, it is equivalent to an express agreement to that effect, and is a waiver of the forfeiture otherwise incurred.

But compare *Union Cent. L. Ins. Co.* v. *Chowning* (1890) 8 Tex. Civ. App. 455, 28 S. W. 117, under IV. a, *supra.*

See also in this connection *Majestic Life Assur. Co.* v. *Tuttle* (1914) — Ind. App. —, 107 N. E. 22, under IV. i, 3, *infra.*

In *Kavanaugh* v. *Security Trust & L. Ins. Co.* (1906) 117 Tenn. 33, 7 L.R.A.(N.S.) 253, 96 S. W. 499, 10 Ann. Cas. 680, it was held that where for eight years an insurance company had permitted an assignee of a policy to pay the annual premium by notes falling due quarterly, and had always notified him when a note was falling due, the policy could not be forfeited for nonpayment of a note under a stipulation therein that it was not to be a payment of the premium or any part thereof in any sense unless paid at or before maturity, unless the customary notice reached him.

But in *Thompson* v. *Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765, it was held that a usage of the insurers not to demand punctual payment of a premium note at the day, but to give days of grace, to wit, for thirty days thereafter, is not a waiver of a clause of forfeiture in case of nonpayment at maturity therein contained.

The reception at different times, by the insurer, of premiums and of payments on notes given for premiums after they were due, and the consequent renewals of the policy at the same time, while evi-

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dence from which a waiver of the condition of forfeiture for nonpayment may be found, cannot be said, as a matter of law, to establish a waiver of a forfeiture subsequently incurred by failure to meet a premium note at maturity. *Marston* v. *Massachusetts L. Ins. Co.* (1879) 59 N. H. 92.

A single unexplained instance of the acceptance of payment of a premium note after it was due is insufficient to establish a course of dealing which will justify the insured in believing that the strict terms of the policy will not be insisted on in the future. *Rhodes* v. *Royal Union Mut. L. Ins. Co.* (1914) 56 Pa. Super. Ct. 233.

8. By agreement for extension.

The general effect of the cases hereinafter set forth may be summarized by stating that where the contract of the parties does not provide that the premium shall be considered as earned, notwithstanding the forfeiture of the insurance, an extension of time, whether before or after the maturity of a note given for a premium, will preclude the insurer from insisting upon a forfeiture; but that where the contract does contain such a provision, an extension, to operate as a waiver, must have been granted prior to the maturity of the note.

Where the effect of the nonpayment of the note is only to render the policy voidable at the election of the insurer, an extension of the time of payment operates as a waiver. *Phenix Ins. Co.* v. *Dungan* (1893) 37 Neb. 468, 55 N. W. 1069.

A forfeiture incurred by reason of the nonpayment of a premium note at maturity may be waived as well by an agreement made for extending the note after its maturity as by one made before. *Knickerbocker L. Ins. Co.* v. *Norton* (1877) 96 U. S. 234, 24 L. ed. 689. This case is distinguishable from those hereinafter noted, on the ground that the policy did not provide that the note should remain in full force and effect.

Where the contract of the parties does not provide that the premiums shall be considered as earned, an extension of time for the payment of premium notes is a waiver of the forfeiture incurred by reason of failure to pay them at maturity. *North American Acci. Ins. Co.* v. *Bowen* (1907) — Tex. Civ. App. —, 102 S. W. 163.

An insurer is estopped to assert a forfeiture by reason of a failure to pay premium notes at maturity, where after the notes have fallen due it has made an attempt to collect the full amount of such notes, whereas if it was relying upon the forfeiture clause it would have been entitled only to a proportionate part thereof, and one of its collectors called on the assured, produced the notes, and requested payment from him, when it was agreed that the time of payment might be extended until the corn on his farm was gathered and marketed,—especially where the insurer had previously accepted

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overdue payments of premiums and overdue payment of notes given in payment of premiums, so that the insured was led to believe up to the time of his death that his policy was still in force. *Majestic Life Assur. Co.* v. *Tuttle* (1914) — Ind. App. —, 107 N. E. 22.

Forfeiture of an insurance policy for nonpayment of a premium note must be considered as having been waived where it appears that failure to pay the note at maturity arose from negotiations between the insurer and the insured as to a cancelation of the policy, in the course of which the agent of the insurer told the insured that "any time within a week would do" for the remittance of the amount to the company. *Home Ins. Co.* v. *Mears* (1899) 105 Ky. 323, 49 S. W. 31.

In *Neal* v. *Gray* (1905) 124 Ga. 510, 52 S. E. 622, it was held that a forfeiture incurred by failure to pay a premium note when it became due was waived where a renewal note was accepted by the company,—the amount of the premium not having been then earned, —and action brought on it by an indorsee of the company.

In *Bennett* v. *Union Cent. L. Ins. Co.* (1903) 203 Ill. 439, 67 N. E. 971, it was held that a forfeiture incurred by reason of failure to pay at maturity a note given for a premium was waived where the insurer subsequently agreed to extend the time of payment of such note in consideration of receiving collateral security therefor.

In *Morrow* v. *Des Moines Ins. Co.* (1892) 84 Iowa, 256, 51 N. W. 3, where a plaintiff who had been behindhand with his payments wrote to the insurance company expressing a desire to cancel his policy, to which the company replied that the cancelation of policies is unavoidably very expensive to the assured, that it was disposed at all times to take care of its patrons, and that, if the only reason for requesting cancelation was the fact that the insured found it burdensome to pay his premium at maturity, the company would endeavor to make it possible for him to pay it without inconvenience if he would take the trouble to drop a postal in advance of the maturity of his note calling attention to the letter, and the plaintiff, having subsequently failed to meet a note at maturity and in consequence receiving a thirty-day notice of suspension, wrote to the company that he was unable to pay the instalment then due, and could not pay it within sixty days, and calling attention to the letter above summarized, to which the company made no reply, and the loss occurred within the sixty days, it was held that no waiver of the provision in the policy that "the company will not be liable for any loss or damage that may occur at any time when any obligation given for the premium remains past due and unpaid," could be inferred from what had taken place between the parties.

A condition in a policy that failure to pay premium notes at or

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before maturity shall avoid and nullify the policy is not waived by an agreement with an agent for renewal of a premium note upon condition of a cash payment to the agent on an indebtedness arising out of his payment to the insurance company of a previous note, where such condition is not performed, although it is contrary to law and invalid as tending to subserve the personal interest of the agent while acting on behalf of his principal, and as tending to place the agent in a position of antagonism to the best interests of the principal. *Union Cent. L. Ins. Co.* v. *Berlin* (1898) 33 C. C. A. 274, 62 U. S. App. 223, 90 Fed. 779.

And on a subsequent appeal (41 C. C. A. 592, 101 Fed. 673) it was held that the conduct of the agent in promising to renew the premium note on being furnished a health certificate from one of the company's physicians, if the insured would make a payment to him upon such personal indebtedness, could not be said to have misled insured or induced him to believe that his premium note had been or would be extended by reason of what had occurred between him and the agent without anything further on his part, so as to estop the insurer from claiming a forfeiture of the policy for breach of the condition requiring prompt payment of the premium.

In *Fry* v. *Franklin Ins. Co.* (1878) 3 Ohio L. J. 161, it was held that a provision that in case a note given for the premium should not be paid at maturity, the full amount of premium should be considered as earned and the policy become void, could not be regarded as waived where after the note fell due the insurer forwarded it to a broker for collection, stating that "the policy is her contract now voided," and the broker, who was an officer in another insurance company having also a risk of the property insured, replied, "Continue the policy in force and we will guarantee payment of the note" to which the insurance company made no reply, and thereafter accepted from the broker a check for the amount of the note out of the proceeds of collateral security which he held for the payment of all premiums due for insurances on the property, it not being bound to refuse to assent to the extension upon receiving the proposed guaranty, and having the right to collect a note overdue even if the policy had become forfeited for nonpayment at maturity.

But upon appeal it was held that as the broker's letter did not, in terms or by necessary implication under all the circumstances, call for a reply if the insurer assented thereto, the court should have submitted the question of such assent to the jury. 40 Ohio St. 108.

Where, although by the terms of the contract the obligation of the insurer is at an end upon nonpayment of a note given for the premium, the note remains in full force and effect, a statement by the insurer's agent that the note may lie by for a few days can be taken only as meaning that he will not press for payment, and not

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that the forfeiture is waived. *Wall* v. *Home Ins. Co.* (1867) 36 N. Y. 157.

See also as holding that where the parties have stipulated that upon failure to pay the note at maturity the entire premium shall be considered as earned and the note payable without reviving the policy, an extension of time does not deprive the insurer of the right to insist upon the forfeiture, *Texas F. Ins. Co.* v. *Knights of Tabor Lodge* (1903) 32 Tex. Civ. App. 328, 74 S. W. 809.

But the right to claim the benefit of a provision in a policy that if any note given for a premium shall not be fully paid when due, then for any loss occurring while such note or obligation remains due and unpaid the insurer shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, is waived where prior to the maturity of a premium note the insurer agreed to extend the time of payment. *Michigan Mut. L. Ins. Co.* v. *Custer* (1890) 128 Ind. 25, 27 N. E. 124.

4. By treating policy as still in force.

Making a loan upon the policy after the maturity of a note given for a premium is a clear recognition by the insurer that the policy was still in full force. *Bradley* v. *Federal L. Ins. Co.* (1913) 178 Ill. App. 524.

The sending of a notice of a second premium over seven months after the maturity and nonpayment of a note given for the first premium must be taken as proof of the fact that the delinquent policy holder was acknowledged by the insurer to be entitled to all the benefits conferred by his contract, and is a waiver of the right reserved in the policy to forfeit the insurance upon the nonpayment of the premium note. *Williams* v. *Empire Mut. Annuity & L. Ins. Co.* (1910) 8 Ga. App. 303, 68 S. E. 1082.

A provision in a note accepted by an insurer in payment of a premium, that if the note shall not be paid at maturity the policy shall be avoided, is waived where in taking a note representing the amount of a premium subsequently becoming due, the insurer deducts therefrom a dividend due to the insured as a policy holder in good standing. *Arnold* v. *Empire Annuity & L. Ins. Co.* (1907) 3 Ga. App. 685, 60 S. E. 470.

In *Washburn* v. *Union Cent. L. Ins. Co.* (1904) 143 Ala. 485, 38 So. 1011, it was held that the conduct of the insurer in retaining after maturity a note given for a premium covering the period within which the insured died, and in requesting the insured to pay the same and not let his policy lapse, and in inclosing to him a dividend receipt for a dividend which had been declared on his policy, to be signed and returned, and which would be applied by the insurer on

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a premium subsequently becoming due,—amounted to a waiver of a condition embodied in the policy and premium note for forfeiture in case of the nonpayment of the note at maturity.

In *Watts* v. *Atlantic Mut. L. Ins. Co.* (1880) 31 U. C. C. P. 53, it was suggested by Wilson, Ch. J., that the right to declare a policy forfeited by reason of the nonpayment of a note containing a provision to that effect is waived by receiving a premium in cash for a period subsequent to that for which the forfeiture is claimed, though before the maturity of the note.

5. By receiving payment after maturity.

As a general rule, the acceptance by an insurance company of the payment of a premium note after maturity is a waiver of a forfeiture of a policy caused by the prior default. *Duncan* v. *Missouri State L. Ins. Co.* (1908) 87 C. C. A. 542, 160 Fed. 646; *Hodsdon* v. *Guardian L. Ins. Co.* (1867) 97 Mass. 144, 93 Am. Dec. 73.

In *Sims* v. *State Ins. Co.* (1870) 47 Mo. 54, 43 Am. Rep. 311, it was held that a provision in a policy that when a note shall be taken for a cash premium any default in its payment will operate to suspend the insurer's liability upon the policy until it shall be paid, was waived where after its maturity the assured, in corresponding with the insurer relative to the cancelation of another policy, said: "Am I indebted for insurance on tobacco? I cannot find the policy, though I am sure there is something due. Please send statement as I wish to settle it,"—in reply to which the insurance company sent a statement crediting him on the note with the balance of the unearned premium on the canceled policy and directing him to remit the balance, which he did by the first mail, although in the meantime a loss had occurred.

An insurance company is estopped to claim the benefit of a provision suspending the policy in case of failure to pay at maturity a note given for the premium, where, after default, it has received and appropriated thereon a sum in excess of the premium earned at the date of the loss. *Phenix Ins. Co.* v. *Dungan* (1893) 37 Neb. 468, 55 N. W. 1069.

The receipt of payment of a note given for a cash premium, after its maturity and after a loss has occurred, is a waiver of a condition in the policy that whenever a promissory note shall be taken for the cash premium the policy in all such cases shall be issued upon the express condition that if the note is not paid within sixty days after the same shall become due, thereafter all obligations to the insured shall be suspended until such time as the said note shall be fully paid, where there is no provision in the policy that in case of default the whole cash premium should be considered earned. *Joliffe* v. *Madison Mut. Ins. Co.* (1875) 39 Wis. 111, 20 Am. Rep. 35.

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In *Phenix Ins. Co.* v. *Tomlinson* (1890) 125 Ind. 84, 9 L.R.A. 317, 21 Am. St. Rep. 203, 25 N. E. 126, it was held that acceptance by the insurer, with full knowledge of the facts, of the amount due on a premium note which was overdue and unpaid at the time of a destruction of a part of the insured property, will render it liable, under a policy providing for a suspension of liability during default in payment of premium note, for the amount of the loss already accrued, and will estop it from claiming either a forfeiture or that its liability revived from time of payment and attached only to property not then destroyed,—at least where the entire premium was thereby paid, and there was no provision that default in payment should entitle the insurer to treat the premium as earned.

But the acceptance of the payment of a premium note after its maturity is not a waiver of a provision in the policy that in case a note given for a premium be not paid at maturity the full amount of premium shall be considered as earned, and the policy shall become void while such past-due note or any part thereof remains overdue and unpaid,—so as to render the insurer liable for a loss occurring in the period intervening between the maturity of the note and the time of its payment. *Williams* v. *Albany City Ins. Co.* (1870) 19 Mich. 451, 2 Am. Rep. 95; *Cardwell* v. *Republic F. Ins. Co.* (1875) Fed. Cas. No. 2,396.

However, in *Smith* v. *St. Paul, F. & M. Ins. Co.* (1882) 3 Dak. 80, 13 N. W. 355, it was held that acceptance of payment of a premium note after default and notice of the loss operated as waiver of a suspension clause in the policy, notwithstanding the recital in the note, "If said policy becomes null and void by reason of nonpayment of this note it shall in no way affect the collection of the note in full,"—such recital not being equivalent to a stipulation that the whole cash premium should be considered as earned, where the policy also provided that on the payment of the note in full the liability of the insurer under the policy should again attach. The court said: "On the failure of the plaintiff to pay the note when due the liability of defendant on the policy ceased, and without restoring such liability it was entitled to receive on such note what the policy had earned while in force, and it could have refused to receive any sum in excess of what the policy had so earned; but the defendant by its agent received the whole cash premium for which the note was given. By so doing it received compensation for the risk covering the time when the loss occurred, and it cannot now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of loss is entirely inconsistent with the claim that the risk was suspended when the loss occurred."

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And see also, to the same effect, *St. Paul F. & M. Ins. Co.* v. *Cooper* (1909) 25 Okla. 38, 105 Pac. 198.

But in *Houston* v. *Farmers' & M. Ins. Co.* (1902) 64 Neb. 138, 89 N. W. 635, it was held that where the policy provides that a failure to pay a premium note when due will suspend the policy during such default, and that it may be reinstated at any time within the life of the policy by payment being made, the collection of the premium after a loss which occurred after the maturity of the note and while the same was unpaid, while reinstating the policy for the remainder of the term, does not constitute a waiver on the part of the insurer so as to make it liable for the loss.

A provision that insurer shall not be liable for any loss or damage while any promissory note or obligation given for the premium remains past due and unpaid is not waived by a demand for payment and acceptance of a remittance in ignorance of the fact that a loss had occurred, where by the terms of policy the insured had the right to revive it, after lapse, for the remainder of the term. *Potter* v. *Continental Ins. Co.* (1899) 107 Ky. 326, 53 S. W. 669.

In *McCluer* v. *Home Ins. Co.* (1888) 31 Mo. App. 62, it was held that where after a loss which occurred while a premium note was past due and unpaid, the insurer's agent examined and adjusted the amount of the loss, notified the insured thereof, and received from him the amount due on the premium note, which was thereupon canceled and returned to the maker, the question whether there was a waiver by the insurer of the stipulated effect of the nonpayment of the premium note to suspend the insurance should have been committed to the jury.

A forfeiture under the provisions of a policy and of a note given for a premium, that failure to pay the note at maturity shall cancel the insurance and terminate the policy, is not waived by the acceptance of a part payment on the note after default, where the premium note also provides that in case of default the whole amount of the note shall be considered earned and shall be collectable by the insurer without restoration of the policy. *National L. Ins. Co.* v. *Manning* (1905) 38 Tex. Civ. App. 498, 86 S. W. 618.

Where the parties have stipulated that upon failure to pay the note at maturity the entire premium shall be considered as earned and the note payable without reviving the policy, the fact that the insurer agreed to an extension of time and thereafter demanded and received payment of the note does not operate as an estoppel and deprive it of the right to insist upon the forfeiture. *Texas F. Ins. Co.* v. *Knights of Tabor Lodge* (1903) 32 Tex. Civ. App. 328, 74 S. W. 809.

Where it is stipulated that in case of default in the payment of the note at maturity the full amount of the premium shall be considered

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as earned, the premium is earned by the risk assumed and borne by the insurer in the period during which the policy was not suspended and was in force; and therefore the acceptance of payment of the note after the destruction of the property insured in no way affects the rights of the insurer, as it is entitled to the payment in any event and in any aspect of the case. *Jefferson Mut. Ins. Co.* v. *Murry* (1905) 74 Ark. 507, 86 S. W. 813.

In *Union Cent. L. Ins. Co.* v. *Wilkes* (1899) 92 Tex. 468, 49 S. W. 1038, it was held that acceptance, after maturity, of payment of the premium note, was not a waiver of the privilege of insisting upon any right growing out of the failure of the insured to pay that note at maturity, since when the insurer agreed to continue the policy in full force upon the insured giving his note for the premium, and he gave the note, he became absolutely bound for its payment.

Where the failure to pay a premium note at its maturity does not effect an absolute forfeiture of the rights of the insured under the policy, but a suspension simply of those rights until the full payment of the note, by which act they will be revived in all of their original force, the receipt of partial payment on the note after default does not constitute a waiver of the provision (*Carlock* v. *Phœnix Ins. Co.* (1891) 138 Ill. 210, 28 N. E. 53; *German Ins. Co.* v. *Denny* (1897) 70 Ill. App. 437), or have the effect to remove the suspension caused by the failure to pay the note (*Phenix Ins. Co.* v. *Bachelder* (1891) 32 Neb. 490, 29 Am. St. Rep. 443, 49 N. W. 217).

In *Garlick* v. *Mississippi Valley Ins. Co.* (1876) 44 Iowa, 553, it was held that a waiver of a provision of the policy that where a note is received for a premium, the insurer shall not be liable for any loss or damage under the policy occurring at the time when such note, or any part thereof, given for such premium in whole or in part, shall be past due or unpaid, could not be inferred from an acceptance by the insurer of a part of the premium after maturity, or from an offer to give a reasonable extension which was not acted upon, or from a statement in a letter to the insured, purporting to be written by the secretary of the company and urging payment, that in case of loss the laws of the state would compel the company to pay.

Where the policy of insurance provides that in case the assured shall fail or refuse to pay a premium note when due "this policy shall then and thence forward be and remain null and void, and the same cannot be revived without the written consent of the company; but this shall not prevent this company collecting, by suit or otherwise, the premium note or notes, order or orders, above described, nor shall such attempt or suit be construed to revive this policy; but the same shall be and remain null and void during such default and until said assured shall pay such premium, note, interest and

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fees and costs, and until this company shall receive the same and return said promissory note to said assured, and in such case this policy shall be revived,"—the act of the insured in accepting part payment of a note after default does not operate as a waiver, so as to reinstate the policy. *Curtin* v. *Phenix Ins. Co.* (1889) 78 Cal. 619, 21 Pac. 370.

A provision of a policy that upon failure to pay any premium note when due the policy shall become null and void without any action or notice by the company, is waived by the acceptance, after default in the payment of a premium note, of interest thereon and part of the principal. *Occidental L. Ins. Co.* v. *Jacobson* (1914) 15 Ariz. 242, 137 Pac. 869.

But a forfeiture under a provision of the policy that if default be made in the payment of any premium note or check, should one be given or accepted, the policy shall cease and determine, is not waived by the acceptance and retention of payments on account made to obtain extensions from time to time, the last extension having expired prior to the death of the insured. *Wood* v. *Confederation L. Ins. Co.* (1901) 2 N. B. Eq. Rep. 217.

6. By failure to cancel or return note.

It has been held, on the one hand, that an insurer cannot claim the right to declare a policy forfeited for nonpayment of a premium, so as to defeat the right of the insured to a paid-up policy, where it retains the note after its maturity, as such retention is sufficient evidence of further grace and a determination upon the part of the insurer to demand the payment thereof. *Johnson* v. *Southern Mut. L. Ins. Co.* (1881) 79 Ky. 403.

So, also, in *Palmer* v. *Continental Ins. Co.* (1901) 132 Cal. 68, 64 Pac. 97, it is held that a provision in a note given for the premium, for a forfeiture of the policy in case the note should not be paid at maturity, is for the benefit of the insurer, and it is not at liberty to retain the note after its maturity as a binding obligation against the insured, with a right to collect if no loss should occur during the life of the policy, or to refuse to pay the loss if it should occur before the payment of the note. The insurer in such case is bound to demand payment at the maturity of the note, and if not then paid can exercise its option to declare the policy forfeited or to continue it in effect.

On the other hand, in *Washburn* v. *Union Cent. L. Ins. Co.* (1904) 143 Ala. 485, 38 So. 1011, it is said that it is doubtless true that the bare retention of a premium note, without more, after default in its payment, will not amount to a waiver of the forfeiture incurred thereby.

This discrepancy in the general expressions used by the courts is

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perhaps due not so much to a fundamental difference of opinion as to differences in the contracts with reference to which such expressions were used.

Thus, where a note given in part payment of a premium is expressed to be "with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured shall become immediately void and be forfeited" if the note should not be paid at maturity, a failure to surrender the note is not a waiver of the right of the insurer to claim and demand a forfeiture. *New York L. Ins. Co.* v. *Warren Deposit Bank* (1903) 25 Ky. L. Rep. 325, 75 S. W. 234.

Where a note given for a premium provides that the policy shall become void and be forfeited if the note is not paid at maturity, a retention of the note after maturity is not inconsistent with an intention to treat the policy as void. *New York L. Ins. Co.* v. *Meinken* (1904) 25 Ky. L. Rep. 2113, 80 S. W. 175.

Where a note given for a premium provides that in case of its nonpayment at maturity the policy shall be *ipso facto* null and void, but that the termination of the insurance shall not impair the validity of the note, but the same shall become due and payable for the proportion of its face and interest that the time the insurance has been extended for bears to the whole term covered by the premium, the mere retention of the note by the insurer after maturity will not amount to a waiver of the forfeiture. *Galliher* v. *State Mut. L. Ins. Co.* (1907) 150 Ala. 543, 124 Am. St. Rep. 83, 43 So. 833.

A stipulation that in case of loss or damage by fire to the property insured, while the note given for the cash premium or any premium or any part thereof shall remain unpaid and past due at the time of such loss or damage, the policy shall be void and of no effect, is not waived by a failure to cancel or return a premium note after it has fallen due. *Ferebee* v. *North Carolina Mut. Home Ins. Co.* (1873) 68 N. C. 11.

Where a note given for an insurance premium contained the express agreement that it is to be accounted simply as an extension of time for payment of the premium, and that if not paid at maturity, with interest, all liability under the policy by reason of the note shall cease, and the application for the policy contained a similar agreement on the part of the insured as to any note or obligation given for premiums, and the policy declared that it was issued in consideration of the declarations, answers, and agreements made in the application and of the payment of an annual premium, and that a failure to make such premium payment should work a forfeiture of all insurance and right under the policy, the mere retention of the premium note after default in payment does not furnish ground for presuming or inferring a waiver of the conditions upon which it was given and accepted.

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Rhodes v. *Royal Union Mut. L. Ins. Co.* (1914) 56 Pa. Super. Ct. 233.

The failure of the insurer to return a premium note is entirely without significance where the policy provides that the possession of such notes by the insurer shall be conclusive evidence that they are unpaid, and that the insurance shall cease to be in force at the expiration of the time for which the premium has been paid. *Roberts* v. *Ætna L. Ins. Co.* (1904) 212 Ill. 382, 72 N. E. 363.

The retention of a note, which is canceled by the insurer, as evidence of its nonpayment, is not a waiver of a forfeiture occasioned by such nonpayment. *Sharpe* v. *New York L. Ins. Co.* (1904) 5 Neb. (Unof.) 278, 98 N. W. 66.

Failure to tender a return of premium notes does not amount to a waiver of a forfeiture occasioned by nonpayment, where the notes stipulate that their acceptance is in no way to affect the condition of the policy respecting the forfeiture thereof, and the policy provides that it is to become void if the annual premium is not fully paid at the specified time, inasmuch as upon the forfeiture of the policy the consideration of the notes fails and they cease to be collectable. *Union Mut. L. Ins. Co.* v. *McMillen* (1873) 24 Ohio St. 67.

But where a sum in cash and a promissory note had been received in payment of a premium, and a renewal receipt issued, and the money paid was sufficient to carry the policy beyond the maturity of the note, the insurer will be held to have waived the right to declare a forfeiture on account of nonpayment of the note at maturity by virtue of a provision therein that if not paid when due the policy shall be null and void, where the insurer has failed promptly to return the note and so much of the cash paid on the premium for that year as was in excess of carrying the policy to the time of the maturity of the note, but on the contrary remained silent for nearly nine months as to the course it intended to pursue. *Montgomery* v. *Phœnix Mut. L. Ins. Co.* (1878) 14 Bush, 51.

In *Clark* v. *Southeastern L. Ins. Co.* (1915) 101 S. C. 249, 85 S. E. 407, where upon the nonpayment of notes given for a premium the insurer did not then assert its right to claim a forfeiture of the policy, but extended the time of payment until a subsequent date, when it again failed to exercise its right to declare a forfeiture but accepted other notes of the insured in lieu thereof, and, notwithstanding the fact that if there was a forfeiture of the policy the insured would not be liable for the full amount of the premium, did not return any of said notes but retained them until the trial of the case, it was held that the question whether the forfeiture incurred by reason of failure to pay the notes at maturity had been waived was for the jury.

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7. By requesting or demanding payment.

See also in this connection, *Majestic Life Assur. Co.* v. *Tuttle* (1914) — Ind. App. —, 107 N. E. 22, set out under IV. i, 3, *supra; Washburn* v. *Union Cent. L. Ins. Co.* (1904) 143 Ala. 485, 38 So. 1011, set out under IV. i, 4, *supra; Garlick* v. *Mississippi Valley Ins. Co.* (1876) 44 Iowa, 553, under IV. i, 5, *supra.*

In *Galliher* v. *State Mut. L. Ins. Co.* (1907) 150 Ala. 543, 124 Am. St. Rep. 83, 43 So. 833, it was held that a forfeiture incurred by breach of a condition in a premium note that if default shall be made in payment thereof all rights and benefits secured by the policy shall cease and determine without notice and the policy shall be *ipso facto* null and void, but that the termination of such insurance shall not impair the validity of the note, but the same shall become due and payable for the proportion of its face and interest that the time for which the insurance has been extended bears to the whole time covered by the premium,— was waived where the insurer, after the note became due, attempted to collect it in full, though the amount due under the terms of the note in case of a forfeiture was less than the face thereof.

Where an insurer takes a note for the premium, and it is provided in the policy that if such a note is not paid at maturity the policy shall be void, but the note represents the premium for an entire year, the insurer by insisting upon the payment of the note in full after its maturity will be held to have waived its right to forfeit the insurance during the year, especially where the note is an interest-bearing obligation. An insurer cannot in any case insist upon the forfeiture and at the same time retain a note taken in payment of an unpaid premium upon the nonpayment of which the forfeiture depends. *Williams* v. *Empire Mut. Annuity & L. Ins. Co.* (1910) 8 Ga. App. 303, 68 S. E. 1082.

A forfeiture incurred by failure to meet at maturity a note given for an insurance premium is waived where the insurer holds the note and demands payment, and the insured has no option not to pay and thereby to render the note void and of no effect. *Union Cent. L. Ins. Co.* v. *Duvall* (1898) 20 Ky. L. Rep. 441, 46 S. W. 518.

An insurer waives a provision of the policy that it shall not be liable for any loss or damage that may occur while a premium note or any part remains past due or unpaid, by demanding payment of a note after its maturity, though the policy also provides that the payment of the note or the part thereof past due shall immediately revive the policy and continue its protection, there being no power given to demand payment of the note and at the same time to insist upon the forfeiture of the policy, except in the event that the assured refuses to settle for the time expired as per terms on short rates, when the whole amount of the instalment remaining unpaid shall be

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declared earned and may be collected by law. *Moore* v. *Continental Ins. Co.* (1899) 107 Ky. 273, 53 S. W. 652.

A condition contained in a policy and note that the policy should lapse and the company not be liable for loss during default in the payment of a note is waived where the insurance company not only retained the note executed by the insured for the premium after it was due, but also unconditionally requested payment in full for the current year. *Walls* v. *Home Ins. Co.* (1903) 114 Ky. 611, 102 Am. St. Rep. 298, 71 S. W. 650.

An unconditional demand for the payment of a premium note after its maturity, unaccompanied by an explanation showing a different intent, is evidence in itself of an intention to waive the forfeiture. *Fidelity Mut. L. Ins. Co.* v. *Price* (1903) 117 Ky. 25, 77 S. W. 384.

Where a policy provides that it shall be void if any premium note is not paid when due, the insurer by demanding payment of such a note after its maturity is estopped to insist upon a forfeiture. *New England Mut. L. Ins. Co.* v. *Springgate* (1908) 129 Ky. 636, 19 L.R.A.(N.S.) 827, 112 S. W. 681, 113 S. W. 824.

In *Palmer* v. *Phœnix Mut. L. Ins. Co.* (1881) 84 N. Y. 63, a provision that if a note should not be paid when due the policy should be null and void was held waived where the agent of the insurer, after the maturity of the note, wrote to the assured asking payment, and again wrote him asking him to send the amount by return of mail or by express, and the assured accordingly forwarded the sum named, which, however, was never received by the agent.

The unconditional demand by an insurance company of payment of an overdue premium note is a waiver of the default, so that the insured may recover on the policy if he immediately complies with the demand by mailing a check for the amount, although the insured property is burning when the demand is received and the policy provides that the company will not be liable for any loss which may occur while any premium note remains due and unpaid. *Limerick* v. *Home Ins. Co.* (1912) 150 Ky. 827, 44 L.R.A.(N.S.) 371, 150 S. W. 978.

A policy of fire insurance cannot be treated by the insurer after a loss has occurred as being void for nonpayment at the maturity of the note given for the premium, where after the note became due the insurer had more than once solicited payment thereof. *East Texas F. Ins. Co.* v. *Mims* (1881) 1 Tex. App. Civ. Cas. (White & W.) 771.

A letter calling attention to a premium becoming due subsequent to a default in the payment of a note given for a previous premium, and stating: "We are particularly desirous of having you continue your insurance with this company, and would respectfully ask that you advise us the reason for your not remitting your premium when

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due," has been held a waiver of the forfeiture incurred by the nonpayment of the note at maturity. *Security Life & Annuity Co.* v. *Underwood* (1912) — Tex. Civ. App. —, 150 S. W. 293.

In *Galliher* v. *State Mut. L. Ins. Co.* (1907) 150 Ala. 543, 124 Am. St. Rep. 83, 43 So. 833, it was said that conceding the necessity of the consent of the insured to a waiver of a forfeiture incurred by reason of nonpayment of a premium note at maturity, under a condition therein that in case of default in payment all rights and benefits secured by the policy shall cease and determine without notice, and the policy shall be *ipso facto* null and void, but that the termination of such insurance shall not impair the validity of the note, but the same should become due and payable for the proportion of its face and interest at the time the insurance had been extended for to the whole time covered by the premium,—there was such a consent where the insurer, instead of attempting to collect the proportionate amount of the premium due in case of forfeiture upon default in the payment of the note, demanded payment of the note in full, and he made a partial payment thereof and promised to pay the balance as soon as he was able.

But in *Bennett* v. *Union Cent. L. Ins. Co.* (1902) 104 Ill. App. 402 (reversed on other grounds in 203 Ill. 439, 67 N. E. 971), a letter notifying the insured that his premium note had fallen due the day before and inviting him to give the matter attention "so the insurance will be protected" was held not to be a waiver of a condition in the policy that failure to pay any note on or before maturity shall avoid the insurance.

And a forfeiture on account of the nonpayment of a note given for a premium, containing the stipulation that "if this note is not paid when due there will be no further extension, and said policy shall then cease and determine and shall be treated in all respects as if this conditional note and cash payment had not been made," is not waived by a letter calling the insured's attention to the fact that the note was in default, and requesting him to give the matter his prompt attention, where under the policy the insured has the right of reinstatement upon producing satisfactory evidence of insurability. *Mercer* v. *South Atlantic L. Ins. Co.* (1911) 111 Va. 699, 69 S. E. 961.

A provision of a fire insurance policy and a premium note, suspending the policy while any note given for a premium remains overdue and unpaid, is not waived by the retention of the note and the sending of a letter to the insured requesting payment, where the letter does not demand payment of the note unconditionally, but only in event the insured shall desire to revive the insurance. *Continental Ins. Co.* v. *Peden* (1911) 145 Ky. 775, 141 S. W. 43.

Such a letter does not amount to a waiver because sent after a

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loss had occurred, where the insurer did not know that the property insured had burned. *Ibid.*

Where a policy provides that it shall be suspended in case of the nonpayment of a premium note at maturity, and that the collection of the note by the insurer shall not make the insurer liable for any loss or damages caused to the property insured while the note is past due and unpaid, but shall only have the effect when fully paid or collected to revive the policy from the date of such payment and collection and continue the same to the end of the term for which it was originally made, the conduct of the insurer in writing to the insured after the maturity of the note, demanding payment thereof and offering to reinstate the policy on payment of one half the note and interest, and to extend time for payment of the balance, is not a waiver. *Lenz* v. *German F. Ins. Co.* (1897) 74 Ill. App. 341.

An insurance company cannot be said to have waived the benefit of a clause suspending the policy while any note given for the premium remains past due and unpaid, and providing that the collection thereof shall in no case revive or create any liability against the insurer for loss occurring while the assured was so in default, by correspondence relative to the payment of the premium note, where the assured was duly notified that the amount was due and that the insurer relied upon the condition of the policy exempting it from liability while it remained unpaid. *Proebstel* v. *State Ins. Co.* (1896) 14 Wash. 669, 45 Pac. 308.

A demand for the payment of a premium note by sending it to a bank for collection after its maturity will not waive a forfeiture where the note provides that the policy shall stand annulled if it is not paid, and that the full amount of the premium shall be considered as having been earned by the policy remaining in force during the period previous to the default. *Marshall* v. *Missouri State L. Ins. Co.* (1910) 148 Mo. App. 669, 129 S. W. 40.

An unsuccessful demand will not waive the forfeiture of the policy incurred by failure to meet a premium note at maturity. *Rhodes* v. *Royal Union Mut. L. Ins. Co.* (1914) 56 Pa. Super. Ct. 233.

In *Sullivan* v. *Connecticut Indemnity Asso.* (1897) 101 Ga. 809, 29 S. E. 41, and *National Life Asso.* v. *Brown* (1898) 103 Ga. 382, 29 S. E. 927, it was held that if a demand upon the insured for payment of premium notes after their maturity could in any event be treated as a waiver by the insurer of a stipulation in the policy that in case any note given in payment of money due the insurer should not be paid at maturity the policy should lapse, it certainly ought not to be so treated when payment is refused.

A demand for the payment of a premium note after its maturity, accompanied by a request for a certificate of health to be approved by certain officers of the company at its home office, is accompanied

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by a claim of the forfeiture of the policy, and so cannot be considered as a waiver of such forfeiture. *Fidelity Mut. L. Ins. Co.* v. *Price* (1903) 117 Ky. 25, 77 S. W. 384.

The forfeiture of a policy by reason of the nonpayment of a premium note at maturity is not waived by writing to insured a letter stating disappointment at insured's failure to pay and requesting him to request time within which to pay. *Parry* v. *Southeastern L. Ins. Co.* (1913) 95 S. C. 1, 78 S. E. 441.

Where a policy of insurance provides that a failure to pay when due any money required by it to be paid shall render it *ipso facto* null and void, and a note given for a premium also expressly recites that if it is not paid at maturity the policy shall become *ipso facto* void and the amount of the note shall be an absolute liability as premium earned, a demand for the payment of the note after it has become due cannot be interpreted as a waiver of the forfeiture. *Laughlin* v. *Fidelity Mut. Life Asso.* (1894) 8 Tex. Civ. App. 448, 28 S. W. 411.

Where the contract of insurance provides that if the premium notes are not paid at maturity the full amount of the annual premium shall be considered as earned and payable without reviving the policy, the fact that premium notes are held after they become overdue, and their payment demanded, in no way tends to prove a waiver of forfeiture. The company has the legal right to retain and enforce payment of such notes without reviving the forfeited policy; and the exercise of that right cannot legitimately be construed into a waiver of other and different rights. *Union Central L. Ins. Co.* v. *Chowning* (1894) 8 Tex. Civ. App. 455, 28 S. W. 117.

A breach of a condition in a policy making it void in case of failure to pay any premium note at maturity and declaring all payments made on it forfeited to the insurer, is not waived by a demand for payment after the maturity of such a note, where the insured has had eleven months of protection under the policy. *McGeachie* v. *North American L. Ins. Co.* (1893) 23 Can. S. C. 148, affirming 20 Ont. App. Rep. 187.

8. By attempt to collect note.

For notes on "Unsuccessful attempt to collect premium as waiver of forfeiture," generally, see 18 L.R.A.(N.S.) 902, and 44 L.R.A. (N.S.) 371.

See also in this connection, *Neal* v. *Gray* (1905) 124 Ga. 510, 52 S. E. 622, under IV. i, 3, *supra*.

The conduct of the insurer in holding a note given for a portion of the premium and endeavoring to collect it after its maturity amounts to a waiver of its right to insist upon a forfeiture. *Fidelity Mut. L. Ins. Co.* v. *Goza* (1913) 13 Ga. App. 20, 78 S. E. 735.

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A forfeiture for failure to pay a premium note at maturity is waived by enforcing collection of the note by suit, notwithstanding a provision in the policy that the premium thus collected should be considered as having been earned. *Union Cent. L. Ins. Co.* v. *Woods* (1894) 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

Where a policy is not rendered absolutely void by the nonpayment of premium notes at maturity, but the contract provides that the insurer has the right, at its election, upon failure to pay a note at maturity, to avoid the policy, that when it shall exercise such election the note or notes then past due shall be payable as premiums up to date of cancelation on the books of the company, while the remaining notes, if any, shall thereupon be surrendered to the maker on surrender of the policy; and the insurer, after giving notice of cancelation on account of nonpayment of a premium note and without taking any like measure with reference to a note subsequently becoming due, enforces the payment of both notes, thereby treating its own action with reference to the first note as ineffectual for the cancelation or annulment of the policy,—it must be deemed to have waived the right to forfeit the policy. *Union Cent. L. Ins. Co.* v. *Jones* (1897) 17 Ind. App. 592, 47 N. E. 342.

In *Bloom* v. *State Ins. Co.* (1895) 94 Iowa, 359, 62 N. W. 810, where the insurer, without at any time making any formal cancelation of the policy, took judgment on the premium note and issued execution thereon both before and after the loss occurred, it was held that it had waived a provision of the policy that if any portion of a premium note shall be due and unpaid the company shall not be liable for any loss that may occur after such maturity and before the payment of the same.

A provision in an insurance policy that the nonpayment of a premium note at maturity "shall void and nullify this policy, without action on the part of the company or notice to the insured or beneficiary," is waived by the insurer's retention of the note, and attempt to collect it after maturity, where the period for which the amount of such note would have purchased insurance has not expired. *Moreland* v. *Union Cent. L. Ins. Co.* (1898) 104 Ky. 129, 46 S. W. 516.

In *Union Cent. L. Ins. Co.* v. *Spinks* (1904) 119 Ky. 261, 69 L.R.A. 264, 83 S. W. 615, 84 S. W. 1160, 7 Ann. Cas. 913, it was held that a provision in a policy of life insurance that nonpayment of a note given for a premium at maturity will render the policy null and void, without action on the part of the company or notice to the insured or beneficiary, was waived by retaining and attempting to collect the note, notwithstanding the company marked the policy on its policy register as being canceled, the court saying: "It is the well-settled law of this state that if an insurer desires to avail itself of conditions in its policy to declare it forfeited for the nonpayment

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of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed, though, to claim both that it is not bound on the policy but that the insured is bound to pay the note. Its action must be consistent. While it may retain the note as evidence of its nonpayment, it must not retain it or treat it as an evidence of that much indebtedness. . . . In the case at bar appellant not only retained the note after its maturity, but repeatedly endeavored to collect it in full thereafter. It thereby claimed that the insured owed to it $396.80 as an enforceable debt. If he did, then appellant was bound to him as the consideration for it upon the policy of insurance."

If the insurer retains a note given for a premium as evidence of indebtedness to it, or asserts it as a debt against the insured, the forfeiture of the policy by reason of the nonpayment of the note is deemed to have been waived. "The reason is, the note is consideration for the carrying of the policy for the full term it represents, say one year. If the insurer asserts it as a debt owing it, then it must concede the equivalent, which is its liability upon the policy for the period represented by the premium note. The company will not be heard to say that the insurer owes it for insuring him for one year, yet deny that he is insured." *New York L. Ins. Co.* v. *Evans* (1910) 136 Ky. 391, 124 S. W. 376.

The right to cancel a policy for nonpayment of a premium note is waived where the insurer does not cancel the policy, but places the note in the hands of an attorney for collection. *Western Horse & Cattle Ins. Co.* v. *Scheidle* (1885) 18 Neb. 495, 25 N. W. 620.

In *Murphy* v. *Lafayette Mut. L. Ins.* (1914) 167 N. C. 334, 83 S. E. 461, evidence that a note given for the amount of the first premium on a life insurance policy was indorsed by the company to its agents, who deposited it for collection, that a certain sum of money and interest in advance was paid thereon, that insured went to the home office of the company and was referred to the bank which had the note, and renewal interest was taken carrying the note to a date prior to which insured died, that before that date the balance due on the premium note was tendered to the insurer, who refused to accept it, and that the insurer had sent to the insured a written notice that the premium note would be due on the date last referred to and saying: "Be sure to get your remittance here by the above date to keep your policy from lapsing,"—was held to warrant a finding that there was an agreement to postpone or a waiver of a condition in the note that unless paid at maturity the policy should be void.

A provision in notes given for an insurance premium that the policy shall be void if the notes are not paid at maturity is waived where the insurer retains the notes after maturity and endeavors to

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collect them in full. *Shawnee Mut. F. Ins. Co.* v. *Cannedy* (1912) 36 Okla. 733, 44 L.R.A.(N.S.) 376, 129 Pac. 865.

A provision that a policy of life insurance shall be void on failure to pay a premium note is waived by bringing suit on such note. *National L. Ins. Co.* v. *Reppond* (1904) — Tex. Civ. App. —, 81 S. W. 1012.

On the other hand, it has been held that where it is stipulated that failure to pay a note given for which a premium when due will forfeit the insurance, such condition is not waived by an unsuccessful attempt to collect the note after its maturity. *Stephenson* v. *Empire L. Ins. Co.* (1912) 139 Ga. 82, 76 S. E. 592.

The provision of a policy that none of its terms can be modified nor any forfeiture under it waived save by an agreement in writing signed by certain officers of the company, has been held to apply only to an express waiver, and not to a waiver implied by law from a course of conduct; and therefore not to preclude the insurer's being estopped from forfeiting the policy under a provision that nonpayment of any such note shall render it void. *Bennett* v. *Union Cent. L. Ins. Co.* (1903) 203 Ill. 439, 67 N. E. 971, reversing 104 Ill. App. 402.

In *Iles* v. *Mutual Reserve L. Ins. Co.* (1908) 50 Wash. 49, 18 L.R.A.(N.S.) 902, 126 Am. St. Rep. 886, 96 Pac. 522, it was held that placing a note given for a premium in the hands of an attorney for collection after the policy has become void according to its terms for failure to pay the note, will not revive the policy if the collection is not effected,—especially where the policy provides that no waiver shall be valid unless in writing.

A provision that in case a note given for the premium is not paid at maturity the policy shall be null and void so long as the note remains past due and unpaid is not waived by the bringing of a suit on the note, the recovery of judgment, and levy of an execution on real estate, where the note also provides that the entire premium shall be considered as earned in case the note is not paid at maturity. *New Zealand Ins. Co.* v. *Maaz* (1899) 13 Colo. App. 493, 59 Pac. 213.

A forfeiture for nonpayment of notes given for a premium is not waived by an attempt to collect them, where the notes stipulate that the contract of insurance should stand annulled if they were not paid; and, further, that the full amount of the premium should be considered as having been earned by the policy remaining in force during the period previous to the default. *Marshall* v. *Missouri State L. Ins. Co.* (1910) 148 Mo. App. 669, 129 S. W. 40; *Duncan* v. *Missouri State L. Ins. Co.* (1908) 87 C. C. A. 542, 160 Fed. 646; *Manufacturers' L. Ins. Co.* v. *Gordon* (1893) 20 Ont. App. Rep. 309.

The collection of an overdue premium note cannot be considered as a revival or restoration of the policy where the policy expressly

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provides that, if a premium note is not paid at maturity, the failure will immediately terminate all liability of the company; that if the note should be paid after maturity and before suit brought thereon, then the policy should come into force again from the date of such payment, but that if the note is not voluntarily paid within sixty days after maturity, and suit is brought thereon after said time, the commencement of such action shall operate as an absolute cancelation of the policy and the whole amount of the premium note be deemed earned, due, and payable; and that the commencement of the action shall operate as notice to the assured of that fact. *Shultz* v. *Hawkeye Ins. Co.* (1875) 42 Iowa, 239.

An attempt to collect a premium note is not a waiver of a right to forfeit a policy for nonpayment of a subsequent premium. *Dibrell* v. *Citizens' L. Ins. Co.* (1913) 152 Ky. 208, 153 S. W. 428.

V. Giving note as exercise of option to make annual payments.

The giving of a note for the whole of the annual premium on a policy providing that the premium may be paid annually, semiannually, or quarterly, at insured's option, is an exercise of the option to pay the premium annually, so that a payment made on the note after maturity cannot be treated as a quarterly payment for the purpose of keeping the policy in force for a part of the year. *National L. Ins. Co.* v. *Manning* (1905) 38 Tex. Civ. App. 498, 86 S. W. 618.

Where an agent taking out a policy on his own life and executing a note for the premium indorses thereon the amount to which he is entitled by way of commission, such credit is not a quarterly or semiannual payment within the meaning of a provision of the policy that "although the contract is based on the receipt of premium annually in advance, the premiums may be paid in semiannual or quarterly instalments in advance, in accordance with the company's table of rates; it being understood that the payment of the semiannual instalment of the premium hereunder shall not continue this policy in force longer than six months nor a quarterly instalment longer than three months." *Franklin L. Ins. Co.* v. *McAfee* (1906) 28 Ky. L. Rep. 676, 90 S. W. 216.

VI. Agreement to notify assignee of maturity of premiums as requiring notice of maturity of premium note.

An agreement by the insurance company to notify an assignee of a policy of the maturity of all premiums upon said policy as they become due is not an agreement to notify the assignee of the maturity of a note given by the assignor for a past-due premium prior to the assignment of the policy. *Bank of Commerce* v. *New York L. Ins. Co.* (1906) 125 Ga. 552, 54 S. E. 643.

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VII. Applicability to premium notes of provision in policy for days of grace for payment of premiums.

A stipulation in an insurance policy that "a grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of 5 per cent per annum," does not provide a grace of one month in the payment of a note given for a past-due premium. *Bank of Commerce* v. *New York L. Ins. Co.* (1906) 125 Ga. 552, 54 S. E. 643.

The month of grace allowed by a policy for the payment of each annual premium does not apply to notes given for a premium long past due and containing an express provision that the policy will be forfeited *ipso facto* by their nonpayment. *Reed* v. *Bankers' Reserve L. Ins. Co.* (1911) 192 Fed. 408.

A provision in an insurance policy for a grace of one month for a payment of premiums does not apply to a note given in part payment of a premium which provides that it shall be paid "without grace six months after date." *Leeler* v. *New York L. Ins. Co.* (1906) 74 C. C. A. 488, 143 Fed. 814.

The one month's grace allowed on payment of premium does not apply in the case of a note given therefor, the policy providing that failure to pay such a note at maturity will avoid the insurance. *McGeachie* v. *North American Life Assur. Co.* (1893) 20 Ont. App. Rep. 187.

Neither a statute which requires that every insurance policy shall contain a provision for a grace of one month for the payment of any premium after the first year, during which month the insurance shall continue in force, nor a policy containing such a provision, entitles the insured to such period of grace for the payment of a note given in consequence of inability to meet a cash premium when due. *Schmedding* v. *Northern Assur. Co.* (1912) 170 Mich. 528, 136 N. W. 361.

VIII. Applicability to premium notes of statute requiring notice of maturity of premiums.

It has been held that a statute requiring notice to be given of the maturity of annual premiums as a condition of the right of the insurer to declare a policy lapsed for nonpayment of an annual premium does not require notice to be given of the maturity of a note given for a premium. *Conway* v. *Phœnix Mut. L. Ins. Co.* (1893) 140 N. Y. 79, 35 N. E. 420; but see comment on this case in *New York L. Ins. Co.* v. *English, infra.*

So, also, in *Bartholomew* v. *Security Mut. L. Ins. Co.* (1910) 140 App. Div. 88, 124 N. Y. Supp. 917, affirmed without opinion in 204 N. Y. 649, 97 N. E. 869, it was held that a statute requiring insur-

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ance companies to give written notice of the maturity of the premiums on life policies does not require notice of the maturity of a premium note providing that if it is not paid when due the policy shall become void, as a condition of the insurer's right to terminate the policy on nonpayment of the note at maturity.

The court in *Banholzer* v. *New York L. Ins. Co.* (1898) 74 Minn. 387, 77 N. W. 295, 78 N. W. 244, 84 N. W. 1115, felt constrained by *Conway* v. *Phœnix L. Ins. Co. supra,* to hold that a statute providing that no policy shall lapse or be forfeited by reason of nonpayment when due of any premium, interest, or instalment, or any portion thereof, unless a prescribed notice is served on the insured at least fifteen and not more than forty-five days prior to the day when the claim is payable, does not apply in case of notes given for a premium, and providing that all benefits which full payment in cash of the premium would have secured shall become immediately void and be forfeited if the note is not paid at maturity.

In *New York L. Ins. Co.* v. *Orlopp* (1901) 25 Tex. Civ. App. 284, 61 S. W. 336, it was held that under the provisions of the New York statute that "no life insurance corporation . . . shall declare forfeited or lapsed any policy hereafter issued or renewed, . . . nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest, or instalment or any portion thereof . . . unless" certain notice be given, it is necessary to give notice of the maturity of notes taken for a portion of a premium, notwithstanding that notice has been duly given with respect to the original premium, the court declining to follow the case of *Conway* v. *Phœnix L. Ins. Co. supra,* and the Minnesota case following it, on the ground that what was said in the New York case was not necessary to the decision.

A like conclusion was reached by the supreme court of Texas in *New York L. Ins. Co.* v. *English* (1902) 95 Tex. 391, 67 S. W. 884, where the court said with reference to the case of *Conway* v. *Phœnix L. Ins. Co. supra:* "We have examined that case carefully, and we are of opinion that the decision is not entitled to be regarded as the law of the state of New York: (1) Because the case had been decided and fully disposed of upon the proposition that the note was taken without authority on the part of the agents, and that the company was not bound by it as an extension of the time of the policy. (2) Because the subject of notice is disposed of in such a manner as to show that it had received no careful consideration by the court. The whole subject is disposed of in this language: 'No further notice was required from the company to the deceased. The notice provided to be given by the statute as a condition of its right to declare a policy lapsed for nonpayment of an annual premium was not necessary, inasmuch as it had duly given the notice before the premium became due, which the statute has provided for. The statute does not

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apply to this case.' No reasoning is indulged in to show why the note is not embraced in the plain terms of the statute, and in fact it is not entirely clear that the opinion refers to this particular point in the statute. (3) The statement of that case shows that the note was given to the general agents, who withheld the renewal receipt. The court held that the agents did not have authority to extend the time of payment. The note did not belong to the company, and, having disposed of the case upon that ground, it would follow that no notice was required to be given by the company as to that note."

And it has been held that a condition in a note given for a premium that the policy should "without notice to any party or parties interested therein be null and void on the failure to pay this note on maturity," does not satisfy the requirements of the New York insurance law relative to the giving of notice to the insured before a life insurance policy may be forfeited. *Strauss* v. *Union Cent. L. Ins. Co.* (1900) 33 Misc. 333, 67 N. Y. Supp. 509, s. c. on appeal 170 N. Y. 349, 63 N. E. 347.

IX. Giving of note as a transaction with the agent personally.

Inasmuch as the perplexing questions which arise where a note is given directly to the insurer for an insurance premium are avoided if it can be shown that the giving of the note was a transaction with the agent personally, it frequently becomes necessary, as in HUTCHINGS v. NATIONAL LIFE ASSUR. CO. to determine whether or not such was the case.

The scope of this note requires the exclusion of cases (of which *Dunham* v. *Morse* (1893) 158 Mass. 132, 35 Am. St. Rep. 473, 32 N. E. 1116, and *Batson* v. *Fidelity Mut. L. Ins. Co.* (1908) 155 Ala. 265, 130 Am. St. Rep. 21, 46 So. 578, may be mentioned as instances) in which although a note has been given by the insured to the agent as part of the transaction, the decision turns upon the question whether the act of the agent in debiting himself and his account with the insurer with the amount of the premium is equivalent to a payment of the premium so as to satisfy the requirements of the policy. Although in such a case the giving of the note may be considered as a transaction with the agent personally, the agent's want of authority to accept credit in lieu of cash makes it necessary to determine whether a substitution of his own credit is tantamount to a payment.

Transaction with agent personally as satisfying condition in policy requiring actual payment, see *Home Ins. Co.* v. *Curtis* (1875) 32 Mich. 402; *Krause* v. *Equitable Life Assur. Soc.* (1894) 99 Mich. 461, 58 N. W. 496, under II. b, *supra.*

In *Pioneer L. Ins. Co.* v. *Cox* (1914) 112 Ark. 582, 166 S. W. 951, where it appeared that the insured paid only a portion of the

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first premium in cash, giving to the soliciting agent two promissory notes for the balance, and that it was customary with the insurer to give the soliciting agent sixty days, and a longer time if necessary, within which to deliver policies, and that the portion of the first premium which was to come to the company was charged to the soliciting agent, and the proof further showed that it was customary for soliciting agents to take notes for the first premium, the greater portion of which was retained by him as commission, and account to the company for the portion of the premium going to the latter, it was held that it was for the jury to say whether the company had waived its right to declare a forfeiture in case the insured failed to pay the premium.

Instances in which transaction has been held a personal one.

Where the amount of the premium is charged by the assured to its agent, who delivers the policy and takes notes for the premium, the insurer cannot claim that because the premium was not paid in cash the policy never went into effect. *Miller* v. *Brooklyn L. Ins. Co.* (1871) 12 Wall. 285, 20 L. ed. 398.

In *Robinson* v. *Union Cent. L. Ins. Co.* (1906) 144 Fed. 1005, where an agent authorized to collect the initial premium made a present of his commissions and bonus to the applicant, and took a note for the balance of the premium, which he discounted at a bank, crediting the insurance company with the amount of the premium, it was held that the court was warranted in instructing that evidence of such transaction would warrant a finding that the premium had been paid. The reversal of this case in 8 L.R.A.(N.S.) 883, 78 C. C. A. 268, 148 Fed. 358, is put on the ground that, conceding that the note effected the payment of one half of the premium, the other half was not paid by the mere words of the agent in making a present of his agreed commission, which he had not in hand and which was not due to him and had not accrued to him by the terms of his contract of agency, under which his commission was not due until the premium should have been paid in cash and the policy issued, and all moneys received by the agent are to be held in trust for the company.

In *Manhattan L. Ins. Co.* v. *Hereford* (1911) 172 Ala. 434, 55 So. 497, where the local agent of the insurer took a negotiable promissory note, payable to himself individually, which he subsequently negotiated, for the initial premium, and sent to the general agents—and they to the company—the amount of the initial premium less his commission, it was held that there was a compliance with the provision of the application that "there shall be no contract of insurance until" the policy is issued and received "and the first premium paid," the court saying: "Such a transaction amounts really to a

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loan of the money by the agent individually to the insured, and while it is true that if the money was never paid to the company at all the insured could not claim it as a payment because the company had not authorized the agent to extend the time of payment, and the insured had trusted to the agent as his agent to pay the money, yet when the agent actually pays the money to the company, it is as effectual as if the insured had paid it himself, and his liability is to the agent on his note."

Where the agents of the insurer were not authorized to take anything except money in payment of the premiums, but consented to take a note, the effect of the transaction being to render them individually liable to the insurer for the amount of the premium, less their commission, the nonpayment of such note does not render operative a clause in the policy providing that it shall not take effect until payment of the premium. *Griffith* v. *New York L. Ins. Co.* (1894) 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113. The court said: "It was in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was as to defendant a payment of the premium to the agents, and not an extension of the time of payment."

See also to the same effect *Jurgens* v. *New York L. Ins. Co.* (1896) 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386.

Where a note for the amount of the premium is given, not to the insurer, but to the agent individually, who directs the insurer to charge the premium to him, there is a payment of the premium so as to put the policy in force and furnish a sufficient consideration for the note. *Rosenborg* v. *Johnson* (1909) 45 Colo. 53, 99 Pac. 315.

In *Mutual L. Ins. Co.* v. *Reid* (1912) 21 Colo. App. 143, 121 Pac. 132, it was held that a life insurance policy had been put in force by delivery and acceptance and payment of the premium by the assured while he was yet in good health, where he gave a note payable to the agent for the initial premium, and after receiving the policy from the agent handed it back to him as pledgee for his own personal protection until payment was made on the note, though the agent indorsed the note and turned it over to the general agent without any instructions that it should be charged to his account.

In *Dunn* v. *Abrams* (1895) 97 Ga. 762, 25 S. E. 766, an action on a promissory note given by defendant to plaintiff in which defendant set up failure of consideration based on the fact that the note was given to pay the first premium on a policy of life insurance written for defendant by the company which plaintiff represented, and that the policy contained on its face the requirement that "this policy shall not take effect until the first premium is paid while the insured is in good health," and also contained, in a copy of the appli-

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cation for insurance which was attached thereto and made a part of the policy, a statement that the first premium had not been paid, it was held that as the agent had in fact paid the first premium in the regular course of his dealings with the company and received from the company the proper receipt for the premium before the policy was delivered to the insured, there was a valuable consideration for the notes sued on.

Where an insurer allows a policy acknowledging receipt of the first premium to be delivered to the insured by its agent under an arrangement whereby the company extends the credit for the insurance premium to the agent, and the agent to protect himself takes from the insured a promissory note payable to himself personally, the insurer will not be allowed to declare the policy forfeited for nonpayment of the note given by the insured to the agent, under a clause in the policy which provides that if a note taken for a premium be not paid at maturity the policy shall be void; although the agent transferred the note of the insured to the company in payment of or as security for the company's account against the agent for the amount of the premium. *Williams* v. *Empire Mut. Annuity & L. Ins. Co.* (1910) 8 Ga. App. 303, 68 S. E. 1082.

In *Southern Mut. L. Ins. Co.* v. *Best* (1886) 8 Ky. L. Rep. 535, where it appeared that the agent of an insurance company had an arrangement with his principal whereby he was authorized to take the note of the insured payable to himself for the cash premium, the company to charge him with the amount, and if the note was not paid to him he was to have the right to turn it over to the company and receive credit therefor, it was held that a note thus taken by the agent payable to himself and afterward turned over to the company was not "a note taken for a premium" within the meaning of a provision of the policy that in case of default in the payment of any premium "or any note given therefor" it should become void.

Where the agent effecting the insurance, in rendering an account to the insurer charges himself with the first premium as cash received by him, a note taken by him for a portion of such first premium is his own property; and failure to pay the same at maturity will not render the policy void by virtue of a stipulation therein that the nonpayment of a premium note when due shall suspend the policy,—especially where the evidence shows that he from time to time extended the date of payment. *Mooney* v. *Home Ins. Co.* (1899) 80 Mo. App. 192.

In *Union L. Ins. Co.* v. *Parker* (1902) 66 Neb. 395, 62 L.R.A. 390, 103 Am. St. Rep. 714, 92 N. W. 604, where insured gave his note, payable to the order of the insurer's agent, for a part of the first premium, and the agent's employment contract entitled him to 100 per cent of the first premium as his commission, and he was charged with the amount of such premium and sold the note, and in-

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sured died after its maturity without having paid it; and afterwards the insurer bought it from the agent's indorsee, it was held that the insurer could not avoid liability on the policy by virtue of a stipulation therein for its suspension during default on any note given for premiums.

Where the premium is charged by the insurer to the agent, and the agent takes a note payable to himself personally, such note is not within the provision of the policy that if any note or other obligation given for the first year's premium or any part thereof shall not be paid when due, then the policy shall become null and void. *Perea* v. *State L. Ins. Co.* (1910) 15 N. M. 399, 110 Pac. 559.

A provision that in case any premium shall not be paid at the date when payable the policy shall thereupon become forfeited and void has no application to a note given for a portion of the premium under an arrangement with the local agent by which the latter agreed to become liable to the insurer for the money and to give the insured time in which to pay the note. *New England Mut. L. Ins. Co.* v. *Hasbrook* (1869) 32 Ind. 447.

In *Thies* v. *Mutual L. Ins. Co.* (1896) 13 Tex. Civ. App. 280, 35 S. W. 676, it was held that if the agent induced the insured to apply for and accept a policy by agreeing to take a note payable to himself, and did so with the consent of the insurer to settle the first year's premium, and the insurer in pursuance of such arrangement issued the policy and placed it in the hands of the agent for delivery, and it was delivered by him, the insurer was bound by the contract of its agent; and that to a note so given a stipulation in the policy that if any note given for the said policy should not be paid on or before maturity the policy should then become void, and insurance cease without notice to the insured, does not apply.

Where, although agents are forbidden to take notes payable to the company for the first year's premium upon policies issued or applied for, it is a common fact known to and approved by the company for agents to take such notes payable to themselves and charge themselves therewith in their agency accounts, the company holding the agents responsible as for a cash collection, such a transaction is a payment of the premium as between the assured and the company. The giving of the note, instead of cash, in advance by the applicant, will not invalidate the insurance if the contract be otherwise complete. *Kimbro* v. *New York L. Ins. Co.* (1907) 134 Iowa, 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025.

In *Buckley* v. *Citizens' Ins. Co.* (1907) 188 N. Y. 399, 13 L.R.A. (N.S.) 889, 81 N. E. 165, it was held that the first premium on a policy of insurance will, as between insurer and insured, be deemed to have been paid at the time the general agents of the insurer extended credit therefor to the insured, where such premium was charged to the agents in their account with the insurer pursuant

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to the general course of dealings between them, which disregarded any arrangements the agents might make with insured as to credit, notwithstanding that a note covering the premium in question given by the insured to the agent did not mature until after an attempt had been made to cancel the policy, nor until after the destruction of the property, and that upon maturity it was taken up by the agents from the bank by which it has been discounted and was still held by them at the term of the action on the policy, they having been credited in the meantime in their account with the company with the amount of premium unearned at the time of the attempted cancelation.

Where it is a practice known to and approved by the insurer for agents to take notes for premiums, payable to themselves, and charge themselves therewith in their agency accounts, the company holding the agent responsible as for a cash collection, such a transaction is a payment of the premium as between the insured and the company. *Life Ins. Co.* v. *Hairston* (1908) 108 Va. 832, 128 Am. St. Rep. 989, 62 S. E. 1057.

In *Lawrence* v. *Penn Mut. L. Ins. Co.* (1904) 113 La. 87, 36 So. 898, 1 Ann. Cas. 965, the court said: "We take it that if the agent of an insurance company, who is authorized to accept cash, accepts the note, he is, in the event of its nonpayment, liable for the note, and the note is considered as so much cash which should have been received by him for account of his company. If the company takes it as its own, and approves his act, it is to be viewed in the light of having possession of a note which it accepted in payment of premium due on the policy."

That the insured executed a note and delivered it to the agent for the amount of the first year's premium, and that at the time of his death he was in default in the payment of this note will not necessarily invalidate the insurance, notwithstanding a provision in the policy that "failure to pay any premium or note or interest thereon when due will forfeit without notice the policy and all payments thereon," as the agent may have taken the note under such circumstances as would constitute an actual payment of the premium. *Devine* v. *Federal L. Ins. Co.* (1911) 250 Ill. 203, 95 N. E. 174.

In *Reppond* v. *National L. Ins. Co.* (1907) 100 Tex. 519, 11 L.R.A.(N.S.) 981, 101 S. W. 786, 15 Ann. Cas. 618, it was held that a provision in a life insurance policy making it void in case of failure to pay a premium note did not apply to a note taken by the agent for his share of the first premium, the share belonging to the company being paid by the applicant in cash, although the note was afterwards turned over to the company for collection.

In *Union L. Ins. Co.* v. *Parker* (1902) 66 Neb. 395, 62 L.R.A. 390, 103 Am. St. Rep. 714, 92 N. W. 604, where insured gave his note due in ninety days from the policy's delivery, payable to the

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order of the insurer's agent, for a part of the first premium, and the agent's employment contract entitled him to 100 per cent of the first premium as his commission, and he was charged with the amount of such premium and sold the note, and insured died after maturity without having paid it, and afterwards the insurer bought it from the agent's indorsee and denied liability on the policy because it contained a stipulation for its suspension during default on any note given for premium,—it was held that a finding by the trial court against such contention of the insurer should be sustained.

Where a policy containing a stipulation that the insurer shall not be liable for any loss occurring before the premium has actually been paid was sent to an agent whose duty it was to deliver the policy and receive the premium, and the agent delivered the policy and took the note of the assured for the premium, which note he had discounted and the proceeds paid to his credit in the bank before the loss, it was held that the premium on the policy was paid when the note was discounted and the proceeds passed to the agent's credit in the bank. *Carson* v. *Jersey City Ins. Co.* (1881) 43 N. J. L. 300, 39 Am. Rep. 584 (affirmed on another ground in 44 N. J. L. 210).

In *Jacobs* v. *Omaha Life Asso.* (1898) 146 Mo. 523, 48 S. W. 462, where the insured gave his note, payable to the agent of the insurer, who discounted it at the bank, took out and sent to the insurance company the premium, and delivered the policy to the insured with the company's receipt for the first premium, it was held that the company could not escape liability on the plea that the first premium was not paid by the insured while "in good health and during his lifetime" as required by the policy.

Where at the time of the delivery of a policy of life insurance the insured gave a note payable to his own order, and indorsed it over to the agent in payment of the first year's premium on the policy, and the agent thereafter sold and indorsed the note to a bank, the transaction amounted to a full payment of the premium for the first year even if the note was never paid, the sale of the note to the bank operating as between the insured and the insurer as the collection of the note. *Thum* v. *Wolstenholme* (1900) 21 Utah, 446, 61 Pac. 537.

In *Porter* v. *Mutual L. Ins. Co.* (1897) 70 Vt. 504, 41 Atl. 970, where an applicant for life insurance gave his note to the agent for the first premium, conditioned to be void if the policy should not be issued, and the application recited that the premium had been paid to the agent, and the policy was issued by the company and sent to and retained by the agent, who when the note matured offered the intestate the policy and demanded payment of the note, and the applicant refused either to accept the policy or to pay the note, it was held that it was not necessary to the completion of the contract that the policy should be actually delivered to the applicant, but that the

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issuance of the policy in accordance with the terms agreed upon and its transmission to the agent for unconditional delivery to the applicant amounted to a delivery, so that the custody of the latter must be treated as that of the applicant, and accordingly that where the applicant died during the period covered by the first premium the insurer was liable for the amount of the policy.

In *Porter* v. *Mutual L. Ins. Co. supra,* where it was found that the local agent took a note for the initial premium on a policy of life insurance and remitted the amount of the note to the company at the end of the month, it was held that the insurer could not take advantage of a provision in the policy that it was not to take effect until the first premium was paid.

In *Aseltine* v. *Perry* (1903) 75 Vt. 208, 54 Atl. 190, it was held that where at the time of the application the applicant executed and delivered to the agent two notes, the consideration for which was an agreement that the agent should pay the insurance company, for the insured, the amount of the first premium, which he did, and held the insurance policy and the notes, the contract of insurance between the company and the applicant was a completed one.

Instances in which transaction has been held not a personal one.

In *London & L. Life Assur. Co.* v. *Fleming* [1897] A. C. 499, reversing 23 Ont. App. Rep. 666, which affirms (the court being equally divided) 27 Ont. Rep. 477, it appeared that at the time of an application for a life insurance policy the applicant handed to the agent his own promissory note payable six months after date to the order of the agent, which note was not in accordance with a form furnished to the agent by the insurance company nor submitted to the company for its approval; that the agent gave a receipt for the note, stating it to be for the first premium and undertaking to return the note should the application be declined, which receipt was in the form supplied by the insurance company except that the sentence, "it is hereby understood and agreed that if the note be not paid at maturity the policy or official receipt shall be null and void, but nevertheless the note shall be paid in full," was struck out; that subsequently the application was altered from an application for a single policy for $5,000 to one for two policies of $5,000 each, which application as altered was accepted, and two official "interim acceptance receipts" were forwarded to the agent for delivery to the applicant; that the agent subsequently received in respect of the premium on the second proposed assurance a note of a third person for the amount of the premium, made payable to himself or order; that these notes were not forwarded by the agent to the head office, but were retained by him, discounted at the bankers' where they were made payable, and the proceeds applied to his own use; that one of the notes was renewed

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at its maturity; that such renewal note and the other note were never paid; that the agent indorsed all the notes and appended at the foot of each his personal guaranty and waiving protest; that according to the ordinary course of business between the agent and the insurance company cash premiums were remitted, and notes taken for premiums were forwarded by the agent to the company at their periodical settlements at the close of each month; that upon the settlement covering the period in question the agent gave his note to the insurance company in respect of the portion of the premiums over and above his commission. Upon this state of facts it was held that in the entire absence of evidence of any agreement to that effect, it could not be assumed that the notes were placed in the hands of the insurance agent as an agent for the applicant in order that he might raise money by negotiating them and out of such money pay the premiums; that conceding that the notes were accepted by the agent in payment of the premiums, a condition of the policy that "if a note or other obligation be taken for the first or renewal premium or any part thereof, and such note or obligation be not paid when due, the policy or assurance becomes null and void at and from default," applied upon their nonpayment when due and the policies thereupon became void. The opinion was further expressed that the fact that the receipt was in express terms a receipt for the note as given on account of the premium, and the circumstances that the notes were for the exact amount of the premiums, thus leaving no margin for the amount to be deducted for interest or discount, was an indication that the fact was that the notes were given for the premiums in accordance with the terms of the receipt produced, and not for the purpose of being discounted by the agent to raise money with which to pay the premiums. In this connection the following passage from the opinion of Burton, J., in the Ontario court of appeal is quoted with approval: "It is said that the fact of the notes being made payable personally to the agent and made payable at a bank is some evidence of an agreement between the applicant and the agent to discount them for him and apply the money on his premium. To my mind it affords no such evidence even if it stood alone, but White gives no such version. Robert Fleming is not called, and it is directly at variance with the receipt produced, which shows it was not given for the purpose of being discounted and paying the premium from the proceeds, but that it was given and accepted as the first premium. It affords, I think, very cogent evidence that the agent contemplated from the first making an improper use of the notes and negotiating them for his own purposes, but not the most remote evidence of an agreement between the applicant and the agent to raise money for him to pay the premium."

In *Pennsylvania Casualty Co.* v. *Bacon* (1904) 67 C. C. A. 497, 133 Fed. 907, where the policy provided that the policy should not

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take effect unless the premium should actually be paid and that no waiver, alteration, or modification thereof should be binding upon the insurer unless the same should be indorsed on the policy, or attached thereto and signed by the president or secretary of the company, it was held that a promissory note given by the insured to the soliciting agent in lieu of the first premium did not operate as a payment thereof.

When the insured, instead of paying the first premium in cash, executes his note therefor, payable to the agent in his representative capacity, and not individually, he being described therein as "agent," the note, being accepted by the company, must be regarded as a note given to the company within the meaning of a provision in the policy that the policy shall be void upon the failure to pay at maturity "notes given the company for premiums." *Union Cent. L. Ins. Co.* v. *Duvall* (1894) 16 Ky. L. Rep. 398.

The fact that a note made in part payment of the initial premium is made to the local agent individually, and not to the insurance company, and that such agent by agreement with the insurer is entitled to receive more than the amount of such note as his commission, does not render such note an effectual payment of the premium, where it has been treated by such local agent and the company as the company's note, since the insured is not entitled to the benefit of the arrangement between the insurer and its local agent as to commissions. *Fidelity Mut. L. Ins. Co.* v. *Bussell* (1905) 75 Ark. 25, 86 S. W. 814.

And in *Mutual Reserve Fund Life Asso.* v. *Simmons* (1901) 46 C. C. A. 393, 107 Fed. 418, where an application for a life insurance policy contained the following provision: "Under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium while the applicant is in good health, and delivery of the policy to the applicant in person during his lifetime and while in good health," and the policy itself provided that it should not take effect "until the first premium is paid in cash hereon while said member is also in good health. No contract, alteration, or discharge of contracts, waiver of forfeitures, nor granting of permits or credits, shall be valid unless the same shall be in writing, signed by the president or vice president and one other officer of the association,"—it was held that an arrangement between the applicant and agent whereby the latter remitted to the insurance company the amount of the initial premium in excess of his commission, and took a note for less than the amount of the premium, was not such a payment of the premium as would initiate the insurance, it not being a payment of or agreement to pay the premium in full, in the absence of evidence that the insurer ever waived the payment of the entire premium to somebody.

[For annotation of the question: "Allowance to applicant of agent's commission as payment of premium," see 8 L.R.A.(N.S.) 884.] E. S. O.

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[ENGLISH COURT OF APPEAL.]

YATES *v.* TERRY.

[1902] 1 K. B. 527.
Also Reported in 71 L. J. K. B. N. S. 282, 50 Week. Rep. 293, 86 L. T. N. S. 133, 18 Times L. R. 262.

Practice — Garnishee summons — Attachment of debt — Payment into court of amount in garnishee order — Balance in hands of garnishee — Assignment — Effect of notice of assignment.

Money in the hands of the defendant was attached under a garnishee order to satisfy a judgment debt. The judgment debtor assigned to the plaintiff the balance of the amount in the hands of the defendant, and notice was given of the assignment. Subsequently a garnishee order was served on the defendant with respect to another judgment debt. The defendant thereupon paid the amount of the first judgment debt into court, and the balance of the money in his hands he paid into court under the second garnishee order. In an action by the plaintiff to recover the amount of the balance:—

Held, that, when the first garnishee order had been satisfied by payment into court, the assignment took effect as to the balance in the hands of the defendant, that the money should have been paid to the plaintiff, and that he was entitled to recover the amount.

Judgment of the Divisional Court [1901] 1 K. B. 102, 70 L. J. Q. B. N. S. 24, 49 Week. Rep. 112, 83 L. T. N. S. 415, reversed.

(January 22, 1902.)

APPEAL from a judgment of the Queen's Bench Division (Lawrance and Kennedy, JJ.) reported [1901] 1 K. B. 102, on an appeal from the decision of the deputy judge of the Liverpool County Court.

The defendant was the receiver and manager of the Wirral & Wallasey Cycle Company, Limited, which was in liquidation. On February 20, 1900, an order was made upon him by the court to pay to one William Henderson, for salary and services, the sum of 50*l.* 1*s.* 6*d.* On February 21 a garnishee summons was served upon him in a county court action, in which judgment had been recovered against Henderson for the sum of 37*l.* 18*s.* 4*d.* The garnishee summons followed the ordinary county court form, and called upon the garnishee "to show cause why an order should not be made upon you for the payment of the amount of the said judgment, or so much

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thereof as shall equal the amount of the debts due and accruing from you to the said William Henderson. And take notice [528] that, from and after the service of the summons upon you, all such debts are attached to answer the said judgment, and that if you shall pay the said debts to the said William Henderson, or otherwise dispose of them, you will be liable to be committed for contempt."

On February 27, 1900, Henderson assigned to the plaintiff the sum of 16*l.* 17*s.* 8*d.* due to him from the defendant, and on February 28 the plaintiff gave to the defendant due notice of this assignment.

On March 15, 1900, a second garnishee summons was served upon the defendant in a county court action, in which judgment had been recovered against Henderson for the sum of 21*l.* 4*s.* 7*d.* The defendant thereupon paid into court under the first garnishee summons the sum of 37*l.* 18*s.* 4*d.*, and under the second garnishee summons the sum of 12*l.* 3*s.* 2*d.*, being the balance of the sum of 50*l.* 1*s.* 6*d.*

This action was brought to recover the sum of 12*l.* 3*s.* 2*d.*, on the ground that the payment under the second garnishee summons after notice of the assignment to the plaintiff was wrong. The deputy county court judge gave judgment for the plaintiff.

The defendant appealed, and the appeal was allowed by the Divisional Court. [1901] 1 K. B. 102, 70 L. J. Q. B. N. S. 24, 49 Week. Rep. 112, 83 L. T. N. S. 415.

The plaintiff appealed.

Whitty, for the plaintiff. The point raised before the county court judge on behalf of the defendant was that the assignment to the plaintiff was ineffectual because of the prior attachment. It is misleading to say merely that the defendant paid the whole amount in his hands into court, because that leaves out of consideration the fact that he paid it in in two separate proceedings. Under order xxvi. A, r. 5, of the county court rules 1889, he paid in under the first garnishee order "an amount equal to the judgment" that had been obtained. Before he did so he was under no obligation to deal with the balance in his hands: *Rogers* v. *Whiteley* [1892] A. C. 118, 61 L. J. Q. B. N. S. 512, 66 L. T. N. S. 303; but payment of the first debt freed the balance in his hands, and the plaintiff [529] was

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entitled to it under the assignment, which was prior in point of time to the second garnishee order. The defendant might have proceeded if there was any doubt as to who was entitled to the balance under rule 11 of the order; but he chose to pass over the assignment to the plaintiff, and to pay the money over under the second garnishee order, and he is therefore liable in this action. *Wood* v. *Dunn* (1866) L. R. 2 Q. B. 73, 7 Best & S. 94, 36 L. J. Q. B. N. S. 27, 15 L. T. N. S. 411, 15 Week. Rep. 180.

Cuthbert Smith, for the defendant. The decision of the House of Lords in *Rogers* v. *Whiteley* [1892] A. C. 118, 61 L. J. Q. B. N. S. 512, 66 L. T. N. S. 303, shows that when this assignment was made there was no chose in action, because the plaintiff could not have sued the defendant. The assignment did not operate until the first garnishee order had been satisfied by payment into court, and by that time the balance in the hands of the defendant was attached under the second order.

Collins, M.R.: This is an appeal by the plaintiff against the result of proceedings which were commenced by him in the county court. He obtained judgment, but on appeal to the Divisional Court the decision in his favor was reversed and judgment given for the defendant. He sued as the assignee of a debt due from the defendant to one Henderson, and he gave notice of the assignment to the defendant. Prior to the giving of that notice a garnishee order had been served on the defendant, attaching all debts due from him to Henderson, to answer the judgment that had been obtained in the county court against Henderson. After the assignment and notice a second garnishee order was served on the defendant, in respect of another judgment obtained against Henderson in the same county court. Under these circumstances, what the defendant did with regard to the fund in his hand was to appropriate a sufficient sum to meet the judgment on which the first garnishee order was founded, and this sum he paid into court. He appropriated the balance in his hands towards satisfaction of the judgment on which the second garnishee order was founded, and he paid it into court in the action in which that judgment was obtained. That was an appropriation which [530] entirely ignored the inter-

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vening rights of the plaintiff as assignee. The county court judge held, on another ground than that argued before us, that the plaintiff was entitled to recover; and it certainly seems to me that he was. It was contended in answer to the plaintiff's claim that the effect of the first garnishee summons was to attach in the defendant's hands the whole of the debt due from him to Henderson, and not merely so much as was sufficient to satisfy the judgment debt, and it was said that while the attachment subsisted it would have been wrong to appropriate any part of the fund to any other purpose, and that therefore the assignment could not take effect. This argument is not applicable to the facts of this case, for the defendant freed himself, so far as the balance of the money was concerned, from liability under the first attachment by the payment into court. He was affected with notice of the assignment to the plaintiff, and held the balance of the money for the assignee, and, as that exhausted the fund in his hands, he was under no liability under the second garnishee order. He remained under liability to pay the money to the plaintiff, and cannot raise the defense that he has paid it away elsewhere, because he did not pay it under any exigency but of his own motion.

I am therefore of opinion that the appeal should be allowed, and the judgment of the county court judge in favor of the plaintiff restored.

Romer, L.J.: I agree. Where a debtor has been served with a garnishee order covering an amount less than the amount in his hands, no doubt he cannot be compelled to make any payment out of the money in his hands to anyone else so long as the attachment is in force. At the same time, it must be remembered that garnishee proceedings are for the purpose of enabling a judgment creditor of the person to whom the debt which is garnished is due to realize his judgment. The person in whose hands the debt is garnished holds it subject to the right of the judgment creditor, and has himself no right to the balance after satisfaction of the judgment. That right to the balance still remains in the person who originally had [531] the right to the whole, and it is capable of assignment. Such a right was assigned in this case, and the assignment completed by notice; so that everything was done to make the

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assignment effective as to the debt in the hands of the defendant, subject to the right of the judgment creditor under the first garnishee order. In the result there was a balance left in the hands of the defendant bound by the assignment, and it was his duty not to let the subsequent garnishee order pass without notice that the fund was not really that of the judgment debtor, so that it could be attached, but that of an assignee. By breach of that obligation the assignee has lost his money, and according to well-known principles the defendant is liable for that loss.

Mathew, L.J., concurred.

Appeal allowed.

Solicitors for plaintiff: *Field, Roscoe, & Company, for Yates & Company, Liverpool.*

Solicitors for defendant: *Sharpe, Parker, & Company, for Bielby & Welby, Liverpool.*

Note.—Effect of assignment of surplus of garnished fund, to defeat a subsequent garnishment.

Although there are many cases involving the question of priority between an assignment of a debt or claim and a subsequent garnishment (in which it is universally held that the assignment, if in good faith and for a valuable consideration, will take precedence), research has disclosed but one other instance containing the additional element of a garnishment prior to the assignment.

This is *Smith* v. *Clinton Bridge Co.* (1883) 13 Ill. App. 572, in which it was said: "The levy of an attachment to the extent of its lien diminishes the property of the defendant; it does not take away his power to transfer or dispose of it, but such transfer will be subject to the lien of the attachment. And where an attachment has been served upon a garnishee, and it appears a debt due by him to the defendant has been equitably assigned before service, the court will take cognizance of, and protect the rights of the assignee. In states where a prior lien is given to the first attachment levied, or preferment to the first garnishee process served on garnishee, such lien or preferment takes effect not only as between plaintiff and defendant, but as between different plaintiffs, when the writ is levied or so served, and the writs will hold the property or debt, in the order of their service; where such priority is given, there is opportunity for the defendant in the interim between the date of the levy or

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service of the first, and the date of the levy or service of the subsequent writ, to sell and transfer the property or make an equitable assignment of the debt; such sale or assignment being, of course, subject to the lien or claim of the writ already served, but being effective, if made without fraud, to prevent the lien or claim of the writ upon which there has been no service from afterward attaching." It was held, however, that the effect of a statute providing that "all judgments in attachments against the same defendant returnable at the same term, and all judgments in suits by summons, capias, or attachment against such defendant recovered at that term or at the term when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share *pro rata* according to the amount of the several judgments in the proceeds of the property attached either in the hands of a garnishee or otherwise,"—was to permit a subsequent garnishee to share *pro rata* in the garnished fund to the exclusion of an intermediate assignee. In this conclusion the supreme court concurred (*Reeve* v. *Smith* (1885) 113 Ill. 47), saying: "The statute that secures equality among the creditors of the common debtor is a wise and just one. Creditors of the attachment debtor ought not to be permitted to obtain an inequitable advantage over other creditors in a fund appropriated by law for a specific purpose, by taking an assignment of it before the time shall have arrived for distribution. That would contravene the positive provisions of the statute, which will not be sanctioned. It is familiar law that a chose in action is not assignable either at common law or under the statute of this state, so as to vest the legal title in the assignee. Such assignee will take the same subject to all defenses that existed against the assignor. In this case the interpleading creditors stand in the shoes of the bridge company, and can, of course, assert no rights in or to the funds attached other than the bridge company itself could do. The statute has fixed the mode by which the creditors of the attachment debtor may share in the proceeds of the property levied upon or in the funds garnisheed, and parties will not be permitted to defeat its provisions in that respect by taking to themselves an assignment of such property or funds, or by any other method that might be adopted. Its provisions in that regard will be recognized as controlling."

But notwithstanding such statute, if the first attaching creditor fails in his action or dismisses his suit, subsequent attaching creditors will lose the benefit of the lien acquired by the former, and will take subject to any intervening lien. (*Paltzer* v. *National Bank* (1893) 145 Ill. 181, 34 N. E. 34); and by parity of reasoning it would seem that the subsequent garnishment would in such case be defeated by an intervening assignment. E. S. O.

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[HOUSE OF LORDS.]

DENABY & CADEBY MAIN COLLIERIES, LIMITED, *Appellants,*

and

YORKSHIRE MINERS' ASSOCIATION and Others, *Respondents.*

[1906] A. C. 384.
Also Reported in 75 L. J. K. B. N. S. 961, 95 L. T. N. S. 561, 22 Times L. R. 543.

Employer and workman — Inducing workmen to breach of contracts with employers — Strike — Principal and agent — Trade union — Authority of branch officials to bind union — Ratification.

Where workmen strike in breach of their contracts those who help to maintain the strike by money and counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers.

A trade union having been sued for damages on the ground that workmen had been induced to break their contracts with their employers by officials of the union, and that the union had ratified and adopted the acts of their officials:—

Held, that the union was not liable, those who procured the strike not having been authorized by the rules or by the action of the union.

(May 14, 1906.)

THE material facts are all stated in the judgment of Lord Loreburn, L.C. The effect of the rules of the respondents' association is given in that judgment, and in that of Lord James of Hereford.

The questions left to the special jury at the trial before Lawrance, J., and their answers, were as follows:—

1. Did the defendants Nolan and Humphries, or either of and which of them, unlawfully and maliciously procure the men to break their contracts of employment by going out on strike on June 29 without giving notice?—Answer, Yes. 2. If you answer the first question in the affirmative, then were Nolan and Humphries, or either and which of them, in so doing purporting to act as agents of the association and for its benefit?—Answer, Yes. 3. Did the members of the committees of the Denaby and

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Cadeby branches, or any of them, unlawfully and maliciously procure the men to break their contracts of employment by going out on strike on June 29 without giving notice?—Answer, Yes. 4. If you answer the third question in the affirmative, [385] then were the members of the committees in so doing purporting to act as agents of the association and for its benefit?—Answer, Yes. 5. Did the defendant association, by its executive council or by its officials, ratify the acts of Nolan and Humphries, or of the members of the committees, in so procuring the men to break their contracts?—Answer, Yes. 6. Did the defendant association, by its officials or by the members of the committees of Denaby and Cadeby branches, maintain or assist in maintaining the strike by unlawful means, that is to say: (a) By molesting or intimidating men who were working for the plaintiffs, with a view of inducing them to cease from so working?—Answer, Yes. (b) By inducing or attempting to induce men who were willing to enter into contracts of service with the plaintiffs or to work for them to refrain from so doing?—Answer, Yes. (c) By the grant of strike pay against the rules of the association?—Answer, Yes. 7. Did the defendants Wadsworth, Parrott, Frith, and Hall, or any and which of them, maintain or assist in maintaining the strike by unlawful means, that is to say, by any and which of the above means?—Answer, Not personally, but as servants of the association. 8. Did the defendants, or any and which of them, conspire with each other, or with workmen in the employ of the plaintiffs, to do any and which of the matters mentioned in question 6?—Answer, Yes. 9. Did the defendants, or any and which of them, unlawfully and maliciously conspire together, and with workmen formerly in the employ of the plaintiffs, to molest and injure the plaintiffs in the carrying on of their business, and were the plaintiffs so molested and injured?—Answer, Yes.

Lawrance, J., entered judgment for the appellants, the plaintiffs in the action. This decision was reversed by the Court of Appeal. Hence this appeal.

Bankes, K.C., and **Lush**, K.C. (**H. T. Waddy** with them), for the appellants.

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Isaacs, K.C., and **Danckwerts**, K.C. (**A. Clement Edwards** with them), for the respondents, the Yorkshire Miners' Association.

L. A. Atherley-Jones, K.C., and **S. T. Evans**, K.C. (**John A. Compston** with them), for the respondents, Wadsworth and Hall.

[386] The arguments ranged over every point that could be raised by the ingenuity of counsel. They cited many cases, none of which were thought material by the House. All the points which go to the root of the matter are dealt with in the judgments.

Lush, K.C., in reply.

The House took time for consideration.

Lord Loreburn, L.C.: My Lords, the litigation out of which this appeal arises relates to a strike at the Denaby and Cadeby collieries, which commenced on June 29, 1902, and ended about the month of March, 1903. It will be convenient to summarize at the outset the main facts which led to this dispute.

For some years before 1902 there had been a controversy between employers and workmen at these collieries in regard to the rate of payment for removing what is called bag dirt. The controversy related to the price list obtaining in these particular collieries, and not elsewhere, though the men had the sympathy of the defendant association and of their secretary, the late Mr. Pickard, who assisted them in negotiating for a settlement. In fact, however, no satisfactory settlement was reached.

On June 14, 1902, another dispute, not confined to these collieries, but applying to all the collieries in the defendant association, was, for the time, ended by the casting vote of Lord James of Hereford, after a meeting of the conciliation board. Lord James awarded, to use a phrase sufficiently accurate for the present purpose, a reduction in wages of 10 per cent. It is said that the men at the two collieries were dissatisfied with this award.

In that condition of things, when some bitterness undoubtedly existed, on Saturday, June 28, certain officials of the Denaby and Cadeby branches of the defendant association summoned a meet-

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ing of the men in both collieries for the morning of Sunday, June 29. Only 400, or fewer, out of 5,000 attended the meeting. It was addressed by officials of both branches, who advocated an immediate strike. Unhappily the men followed this advice, and passed a resolution to stop the wheels. Pickets were placed, and on the night shift of that Sunday, June 29, all except four refused to work. On Tuesday, July 2, one of the four was assaulted in [387] a cowardly fashion, and then the other three ceased working also. Few, if any, of the others worked from June 29 until the end of the strike in the following March.

Inasmuch as the men were all working under contracts which could not be terminated except after fourteen days' notice, it is manifest that the abrupt cessation of work on June 29 involved a breach of contract and was unlawful.

This was fully recognized by the council of the defendant association, to which many of the strikers belonged. I shall discuss later on the relations between the Denaby and Cadeby branches of the association and the association at large. At present it is enough to say that the council of the association constituted its supreme governing body and controlled its funds. At this stage the council refused to maintain the strike by giving strike pay. Further, they sent representatives at once to the two collieries, who told the men they had acted illegally in breaking their contracts and must return to work, and that then they could take a ballot according to the rules of the association to decide whether they should resume the strike after working out their fourteen days of contract service. The men consented, and, but for an accident, would have resumed work.

In August, 1901, the Home Secretary had issued some new regulations in regard to timbering, which, rightly or wrongly, were by some persons supposed to be *ultra vires*. Those who had been employed in these two collieries before August of 1901 had signed contracts which left them free to contest the legality of these regulations because the regulations were not embodied in their contracts, and therefore had no contractual force upon them. When on July 17, 1902, the workmen offered to resume in compliance with the advice of the defendant association they were required to sign fresh contracts in accordance with the practice always observed in those collieries in regard to workmen

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who had been absent from their work. These fresh contracts expressly embodied the new regulations of the Home Secretary, and the men declined to sign them, a proceeding in which they were supported, not only by the officials of their branches, but also by the officials of the defendant association. Accordingly the strike continued.

[388] After this incident the council of the association treated the case no longer as a case of strike, but of lockout, and claimed that they were entitled, under the rules of the association, to grant at these two collieries strike pay. Strike pay was granted by the defendant association from August 24 (dating back to August 17), 1902, down to February, 1903, when one Howden, a member of the association, obtained an injunction against the association prohibiting any further grant of strike pay on the ground that the rules did not admit of this payment under the circumstances. That view was upheld on an appeal to this House. *Yorkshire Miners' Association* v. *Howden* [1905] A. C. 256, 74 L. J. K. B. N. S. 511, 53 Week. Rep. 667, 92 L. T. N. S. 701, 21 Times L. R. 431. As soon as the injunction was granted the men in both collieries submitted, and the strike ended in March, 1903.

After the strike ended the Denaby & Cadeby Main Collieries, Limited, brought this action. Though there were many defendants, the chief purpose was to fix the defendant association, who alone were in the position to pay damages, with a liability for the loss that had been incurred by the plaintiffs. For the present, therefore, I will deal with the case only so far as it relates to the defendant association.

The pleadings are of great length, and state the contentions in various forms; but after the evidence had been given counsel for the plaintiffs asked the learned judge to leave nine questions to the jury. Counsel for the defendants, claiming that there was no evidence to go to the jury, refused either to suggest questions for themselves or to take responsibility for those suggested on behalf of the plaintiffs. The learned judge accordingly left to the jury all the nine questions as they stood. The jury answered all of them in favor of the plaintiffs, and they embody the ultimate form in which the case against the defendant association was shaped.

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Taken from this source, the first head of claim by the plaintiffs may be stated as follows: The defendants Nolan and Humphreys unlawfully and maliciously procured the men to break their contracts of employment by going out on strike on June 29 without giving notice. In so doing Nolan and Humphreys purported to act as agents of the defendant [389] association and for its benefit. The members of the committees of the Denaby and Cadeby branches of the defendant association also unlawfully and maliciously procured the men to break their contracts of employment by going out on strike on June 29 without giving notice. They also, in so doing, purported to act as agents of the association and for its benefit. And the defendant association, by its executive council or by its officials, ratified these acts of Nolan and Humphreys or of the members of the committees. In short, the plaintiffs say that the defendant association by its agents instigated the commencement of the strike, and ratified the acts of its agents in procuring the breach of contract. This head covers questions 1 to 5 inclusive.

Now it is quite clear that the central council did not know the strike had begun till Monday, June 30. When they learned of it they at once declared that it was illegal. If we yielded to the suggestion that the strike of June 29 must, nevertheless, from its very suddenness, have been engineered by the central council behind the scenes, we should be acting on pure imagination. Nor can I see any evidence that the persons who procured the men to break their contract purported to act as agents of the defendant association, or that the latter at any time ratified that proceeding. All the proof is that the breach of contract was from beginning to end disapproved at headquarters.

Another view, however, was presented in regard to this first period. Mr. Bankes contended that Nolan and Humphreys, delegates of the two branches, and the committees of the two branches, had, as the jury found, in fact procured the strike on June 29 in breach of contract, and that the defendant association was, under its constitution and rules, liable as principals for this wrongful conduct of their agents, apart from any ratification. It is necessary to ascertain the relations of the association with its branches and their respective officials in order to decide this point of agency.

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In substance the position is as follows: The defendant association comprises about 150 branches, extending, we were told, over Yorkshire and the Midlands. The Denaby branch and the Cadeby branch consist of men working at each of these two adjoining collieries, both belonging to the same owners, and [390] I suppose, roughly speaking, that each branch of the association consists of men working in the same colliery or under the same employers. Certainly in the present case it is so.

Every member of the association contributes according to a fixed scale to its funds. These funds are collected by the branch, and after defraying its local expenses the balance is handed over to the association to be applied in paying the general expenses, the benefits, such for example as funeral allowances, and also, in case of need, in maintaining a strike. There are branch officials elected by members of the branch, and central officials of the association elected by the branches.

The supreme government of the association is vested in the council (central council, I will call it), which consists of officials, the president, two secretaries, the treasurer, and also of delegates, one from each branch, each with a voting power proportioned to the number of members in the branch. It is unnecessary to mention the central executive committee, which only acts on emergencies in the interval between council meetings, and has no authority in regard to strikes.

Besides these central bodies each branch has a committee of its own, consisting of persons elected by members of the branches. Careful provisions are to be found in the rules dealing with the rights and duties of the association and the branches respectively in case of strikes and lockouts, and for a very obvious reason. Strikes or lockouts may be, and generally are, local in their character, and arise out of disputes relating to the local conditions of service. If one branch were able without control to call out its members on strike in consequence of a local dispute and to claim the financial support of the entire association as a matter of right, then the caprice or folly or selfishness of a few men might dissipate the common funds of all. Hence the necessity for strict rules.

No branch is allowed to strike unless two thirds of its members, voting by ballot, so determine, nor unless three fourths of

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the members composing the branch record their votes. And even if that majority is procured the members of the branch are entitled to strike pay only "if the employers refuse to remedy their grievances, and after all proper and peaceful means have [391] been tried to effect a settlement by deputations from members with the advice and assistance of the council, and such member or members be permitted to cease work by the sanction of the association in accordance with the rules." Rule 72. Another rule authorizes a registered vote to be taken throughout the entire association whenever any number of branches numbering one fourth of the council demand such vote on (among other things) "the adoption or prolongation of a strike." Rule 12.

The net result of these provisions is that all strikes of a branch are prohibited unless the prescribed majority of branch members is obtained; that no strike pay is to be granted except the strike be sanctioned by the central council after peaceful efforts have been exhausted, but that a plebiscite of the entire association may adopt a strike after it has commenced.

On the other hand, if any branch is locked out in consequence of any action lawfully taken by the association to remedy grievances, the men are entitled to maintenance equal to strike pay.

Can it be said in the face of these rules that the association is liable in damages for the action of delegates or of branch officials or committees in procuring a strike (whether accompanied or not by breach of contract) without a ballot, without the sanction of the council, and without a registered vote of the entire association? In my opinion the association is not so liable.

The delegates are agents of the branches to represent them in the council. When acting in the council they are agents of the entire association to do the business of the council. They are not agents of the association to represent it or act for it in their localities, either as to strikes or other matters.

Branch officials and committees are elected by members of the branch, who are engaged in a common service under one particular employer. If they quarrel with the employers about the conditions of their service they have a right to strike. The association does not confer that right, which is derived from the general law, but it restricts the right by rules requiring a prescribed majority as the indispensable preliminary. I do not see

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[392] how either the officials or committees thereby become agents of the association to procure a strike even if it were lawful and regular, still less to procure it contrary to the rules and contrary to the law in breach of existing contracts.

It is true that on certain conditions the association is bound to furnish strike pay. Will that circumstance create the agency for which Mr. Bankes contends? I will suppose that the employers also are members of an association of coal owners, as we were told they are, and that the coal owners' association bind themselves to support each other with money in the event of any one member locking out his workmen after certain conditions had been observed. If such member locked out his men without giving the notice prescribed by contract, it would seem very strange to suppose the other members were liable to damages for an act over which they had no control and which was contrary to the conditions. Yet the cases are precisely the same.

In my opinion the first head of claim entirely fails.

The second head of claim advanced by the plaintiffs is to be found in questions 6, 7, and 8, and relates not to the initiation of the strike, but to its maintenance by the defendant association after it had been commenced.

It amounts to this, that after the strike had commenced, the defendant association, by its officials or by the members of the committees of the Denaby and Cadeby branches, assisted and maintained the strike by means of intimidation in order to prevent the men who were still working from continuing to work, by inducing others not to enter the plaintiffs' service and by granting strike pay against rules of the association. It also charged, as appears by question 8, against all the defendants that they conspired with the other defendants or with the plaintiffs' workmen to do all these things. This latter point really adds nothing to the charge, and in no case could any judgment be entered in respect of the 8th question, because the answer leaves it quite open which of the many defendants were guilty and of which, among the several accusations made against them, any of the defendants were guilty.

I find no evidence in support of any material part of this [393] charge against the defendant association. That also was the view of the majority of the Court of Appeal (Mathew and Cozens-Hardy, L.JJ.), though the Master of the Rolls dissented.

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As to the charge that the central council granted strike pay against the rules of the association, that is certainly true, and the fact was finally estalished in *Howden's Case,* decided by your Lordships in 1905. The association was restrained at the instance of one of its members from applying its funds for strike pay upon the ground that such payment was not authorized by the rules. I fail to see how the fact that the rules were contravened can confer upon the plaintiffs any ground of action which otherwise they would not have possessed. The wrong committed by the central council of the association was against its own members in dissipating their funds, not against the employers, who had no interest in the funds. Had the rules permitted it the grant of strike pay would have given the plaintiffs no cause of action. It seems a novel argument that they should acquire a right of action from the fact that the money so paid was derived by breach of trust from the funds of the association whom they sue. It is an attempt by persons who are no parties to the trust to sue for breach of it those who are parties.

The third and last head of claim was formulated in the 9th question put to the jury, which runs as follows: "Did the defendants, or any and which of them, unlawfully and maliciously conspire together, and with workmen formerly in the employ of the plaintiffs, to molest and injure the plaintiffs, and were the plaintiffs so molested and injured?" To this question the answer of the jury was, "Yes." Here, again, no judgment could be entered against any defendant upon this answer, for the simple reason that the jury have not informed us which of the defendants took part in the conspiracy. In the view, however, that I take, this circumstance will not affect the result. The question itself relates entirely to an alleged conspiracy after the commencement of the strike to which workmen formerly in the employment of the plaintiffs were parties.

No unlawful methods were used by the defendant association or sanctioned by it. And if we were to hold that those who maintained the strike by helping with money the men on strike [394] and their families are liable in damages merely because it caused loss to the employers, we should in effect be saying that every strike is an actionable wrong.

Accordingly I am of opinion that no case has been established against the defendant association.

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In regard to the other defendants, Nolan and Humphreys suffered judgment to go by default, and are not before your Lordships' House. The remaining defendants and the representatives of those who are deceased have hardly been the subject of attack in this House, and no separate argument directed against one or more of them apart from the defendant association has been advanced. It is sufficient to say that their case stands upon substantially the same footing as the defendant association, and that in regard to them also I think the judgment of the Court of Appeal ought to stand.

Lord Macnaghten: My Lords, I have had the advantage of reading in print the judgment which has just been delivered, and I entirely agree with it. I do not think I could usefully add anything to what the Lord Chancellor has said.

Lord Davey: [1] My Lords, the Yorkshire Miners' Association is a trade union registered under the trade union acts 1871—6. It consists of 150 branches, including the Denaby Main branch and the Cadeby Main branch, and has about 63,000 members. The association is governed by rules which provide for the appointment of a president, general and financial secretaries, a treasurer, and a general council consisting of the above officers of the association and elected delegates from each of the branches, with an executive committee with limited powers to act in urgent cases. The branches also have their own chairman, secretary, treasurer, and committee. The object of the action out of which this appeal has arisen is to make the general funds of the association liable for the damage sustained by the appellants, the owners of the Denaby Main and Cadeby Main [395] collieries, through a strike of the men employed at those collieries which lasted upwards of six months. The association, representing all its members, says that its funds can only be made liable for the consequences of acts done by its duly appointed officers or its executive council acting within the powers intrusted to them respectively by the rules or by some agent

[1] This opinion of Lord Davey's was, owing to an accident, not delivered in the House, and is therefore not binding as an authority. It is printed here for its intrinsic value.

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employed by them for an authorized purpose and acting in the course of his employment.

The learned counsel for the appellants, in their very able arguments, endeavored to show that the officers of the branches were officers of the association, and acted as such in initiating and conducting the strike in question. A careful examination of the rules with the assistance of counsel on both sides has satisfied me that this contention cannot be maintained, and that the branch officers were not agents of the association in any sense relevant to the present discussion, or empowered to commit or bind the members of other branches by their action. The branch officers were bound to conform to the rules and to any minutes of the general council, but, subject to such restrictions as might thereby be imposed on them, they had the entire control and management of the business of their branches. In particular I am of opinion that every branch had an independent right to determine for itself whether it would strike or not without the intervention of the general council. But no member could receive strike pay from the general fund unless the strike receive the sanction of the association. In rule 12 provision is made in a certain event for a general vote being taken on the "adoption or prolongation" of a strike. Assuming that rule to apply to local strikes, which is not clear, the only effect of the council withholding its "adoption" or "sanction" (whichever word is used) seems to be that strike pay will not be allowed.

The first five questions answered by the jury relate to the period from June 29 to July 17, 1902. All the learned judges in the Court of Appeal were agreed that there was no evidence fit to be laid before the jury to support these findings, and I agree. Indeed, in my opinion, it would not be too much to say that the evidence given proved exactly the reverse of these findings. The arguments in support of the [396] findings were, first, that the officers of the branches were for this purpose, and acted in the initiation of the strike as, the agents of the association, upon which I have already made my comment; and, secondly, a suspicion suggested by counsel (for it was nothing more), unsupported by any evidence fit for consideration by the jury, that the "bag dirt" dispute was not the real cause on which the men determined to strike on June 29. That dispute, it was

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said, was a mere pretext to cover their dissatisfaction with the recent award of the umpire of the Conciliation Board directing a reduction of 10 per cent on the standard wages throughout the district, and the strike was in fact a general strike organized by the general council. The history of the strike is made clear on the documentary and oral evidence. The bag dirt question had been a long-standing grievance at the Denaby Colliery, and on Saturday, June 28, stoppages of a considerable amount were made from the wages of the miners in connection with it, and (as they thought) unjustly. This event excited some irritation, and on the following day, Sunday, June 29, the local leaders, in what counsel aptly described as a fit of temper, held a meeting and unadvisedly passed a resolution to stop work at the Denaby Colliery, without communicating with the officers of the association at Barnsley, and without either taking a ballot or giving notices to determine their contract with the colliery owners. The miners at Cadeby, in sympathy with their comrades at Denaby, passed a similar resolution. The strike commenced on the same evening, and information was given to Mr. Pickard, the general secretary of the association, on the following day. The resolution thereupon passed by the executive committee of the association on June 30 was unexceptionable in its terms, and in accordance therewith Mr. Cowey, the president, sent a telegram to the branch secretaries that the men must resume work at once, as they were out contrary to the rules and resolutions of the association. At a meeting of the general council held on July 19, Mr. Wadsworth, the vice president, and Mr. Walsh, another member of the council, were directed to attend a meeting on the following day and tell the men that they must resume work, and then take a ballot of Denaby and Cadeby Main collieries the first day they work as to whether [397] or not they would give in their notices to terminate their contract of service to get their grievances settled, and Mr. Pickard was directed to communicate with Mr. Chambers with a view to the men resuming work.

Walsh and Wadsworth attended a meeting at Denaby on July 15, and both made speeches. They told the men they were outside the rules of the association, and advised them to humble themselves and resume work and hold a ballot, and a resolution

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to that effect was passed unanimously. These speeches were copiously commented on during the hearing of this appeal, and I have since had the opportunity of reading and carefully examining them. The speakers both expressed strong sympathy with the efforts of the men to get their grievances redressed, and their regret (which they said was shared by the council) that the council could not help them while they remained outside the rules. They spoke severely, and in terms which were neither complimentary nor polite, of Mr. Chambers's unwillingness (as they considered) to meet the men fairly with a view to a settlement of what they considered their grievances of long standing. A passage in Walsh's speech referring to the "rats" at Denaby is open to some criticism. But, looking at the object and general tenor of the speaker's remarks, I do not think that the speech can fairly or reasonably be interpreted as an incitement to the men to commit acts of violence, intimidation, or other illegal character in connection with the strike.

This ends the first chapter of the story. It is apparent from the documentary evidence (including the notes of the speeches made by them) that the local leaders acted on their own impulse, and did not purport to act on behalf of the association or for the benefit of the association. In fact the bag dirt dispute seems to have applied only to the Denaby colliery, and I have not found any evidence which contradicts or qualifies the prima facie inference to be drawn from the documents. I have some difficulty in understanding what is meant by ratifying an act done by persons not purporting to act on behalf of another or for his benefit. But it is really not necessary to discuss this, because both the officials and the general council of the association repudiated the action of the local branches as soon as they heard [398] of it, as being outside the rules. I am, therefore, of opinion that there is no evidence to sustain the first five findings of the jury.

When the men went to resume work on the night of July 16 or morning of July 17 they found that they would not be permitted to do so unless they "signed on" afresh, or, in other words, entered into new contracts of service. The evidence is not very clear; but it seems that the contract books which they were required to sign incorporated some timbering rules which had

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been made and promulgated in August, 1901, and were not therefore in the contract books which they had previously signed, although Mr. Chambers was probably right in saying that they did in fact form part of the contract under which the men were working at the time when they ceased work. Anyhow the men were suspicious and averse to signing anything which seemed to them a new form of contract, and Mr. Pickard supported them by his advice, though the reasons for such advice can unfortunately only be matter for conjecture. The men, therefore, did not resume work in the pits.

My Lords, the appellants were perfectly within their right in electing to treat the absence of the men from work since June 29 as a rescission of their contracts, and requiring them to enter into new contracts of service before resuming work. But they cannot have it both ways. If these men were no longer in the employment of the colliery owners the original vice which infected the initiation of the strike on June 29 was purged, and the men were no longer in the position of "playing" (to use their own expression) in breach of their contracts, but were henceforth men who declined to enter into contracts of service with the colliery owners on the conditions offered them, which they had a perfect right to do. Then came the important question of strike pay. Mr. Pickard appears to have thought that the situation resembled a lockout by the colliery owners, and strike pay could properly be paid in accordance with the rules. And on July 24 a resolution was passed at a special council meeting that strike pay be paid from the first day when the men presented themselves for work, and Mr. Chambers would not allow them to resume work unless they signed a new contract. Strike pay was accordingly paid out of the funds of the association until [399] February, 1902, when it was stopped by injunction in Howden's action, and the strike collapsed.

My Lords, it has been held in this House, affirming the decision in the courts below, that the payment of strike pay to the Denaby and Cadeby strikers was unauthorized by the rules of the association, and therefore illegal. *Yorkshire Miners' Association* v. *Howden* [1905] A. C. 256, 74 L. J. K. B. N. S. 511, 53 Week. Rep. 667, 92 L. T. N. S. 701, 21 Times L. R. 431. There is no evidence impugning the good faith, both of Mr.

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Pickard and the council, but they made a grevious mistake. The payment was *ultra vires* as regards not only the council, but also as regards the association itself. In other words, it was not the act of the association, and was incapable of ratification by the members of the association. And I have some difficulty in seeing under these circumstances how the unauthorized employment of the association's money by its trustees can prejudice or create any liability against the association.

The general council made two further attempts to arrange an interview with the colliery manager with a view to the settlement of the strike, but without result. There is no record or evidence of any further intervention of the general council or executive committee, or any of the officers of the association, until November 17, when by a resolution of the executive committee Messrs. Parrott and Walsh were commissioned to attend a meeting on the 24th. Parrott was what was called the "agent" of the association, the duties of his office being defined by rule 16. He was also a member of the conciliation board of the employers' and workmen's representatives. The meeting which he attended was occasioned by the appellants having caused some of the men on strike who occupied cottages to be served with ejectment notices. Mr. Parrott made a speech, the general tone and effect of which appears to me to be unexceptionable. It was, in fact, in favor of ending the strike. But in the course of it he used the epithet "devilish." He said that to turn people out of their houses and let them remain empty was a most devilish thing in his opinion. He explained in his evidence that he was thinking of the women and children and the approaching winter. But even so the epithet was exaggerated and ill-advised. It is possible, [400] however, to make too much of it, and I am not disposed to regard an isolated expression like this as either evidence of a malicious intention, or desire to spite the appellants, or an incitement to violence or illegal action. As a matter of fact, although ejectment orders were obtained, they do not appear to have been proceeded with, and there is no evidence of any harm having been done by Parrott's speech. The resolution passed was in favor of taking steps to end the strike by negotiation as urged by Parrott.

My Lords, I am of opinion that the sixth, seventh, eighth,

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and ninth findings of the jury also cannot be maintained. In my opinion there is no evidence that the association by its officials took part in or was privy to either molestation or intimidation, and I have already expressed my opinion that the association was not responsible for the acts of the branch officials. I do not think that inducing or attempting to induce men not to work for a particular employer, or a combination for that purpose, is a cause of action, if it be done in furtherance of what the parties in good faith believe to be their trade interests, though it may injure the employer in his business. *The Mogul Steamship Company's Case* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, and *Allen* v. *Flood* [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258. If this were not so, I do not very well see how any general strike could ever be maintained. On the other hand, if the combination be actuated by a malicious intention to spite and injure another without just cause it would be actionable. *Quinn* v. *Leathem* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749. I have examined this evidence with the assistance of the able arguments addressed to your Lordships, and I do not find any evidence of any such unlawful and malicious conspiracy in the present case. If, as all the learned judges in the Court of Appeal agreed, the branch officials were not acting as agents for the association in the initiation or conduct of the strike, the only facts which can be relied on as evidence against the association are the grant of strike pay and the speeches made by Walsh and Parrott. And I am of opinion that those facts are an insufficient foundation for the verdict of the jury against the association in this action.

In my opinion the appeal fails, and should be dismissed, with costs.

[401] **Lord James of Hereford:** My Lords, the facts controlling the case have already been so fully stated to your Lordships that I shall not refer to them beyond the extent necessary for explaining the judgment I have arrived at.

The action was brought to recover damages from the defendants, an association registered under the trade union act of 1871,

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and from certain individuals, the trustees, and other officers of the said union.

Substantially the cause of action (as alleged in the pleadings) was that the several defendants had wrongfully employed the funds of the defendant association in wrongfully and maliciously procuring and inducing workmen employed or formerly employed by the plaintiffs to break their contracts with the plaintiffs, and not to enter into contracts with them, and unlawfully to remain in possession of the plaintiffs' houses, and for wrongfully and maliciously aiding and carrying on by unlawful means a strike of the plaintiffs' workmen. A claim was also made to recover damages on account of a conspiracy to effect the same unlawful acts.

The case as presented by counsel at the bar on behalf of the plaintiffs sought to establish the liability of the defendants on various grounds. It was argued: (1) That the defendant association—the central body—by themselves or their agents molested the plaintiffs in carrying on their business. (2) If this was not established, then in the alternative that the defendant association ratified the acts of the branches of the association. (3) That the defendant association, by themselves or their agents, supported and maintained the plaintiffs' workmen in carrying out certain illegal acts. (4) That the individual defendants were personally liable in respect of the above alleged causes of action.

The solution of the questions raised by these propositions depends upon the construction to be put upon the constitution of the defendant trades union under its rules, and also upon the result of certain facts given in evidence. This union is registered under the acts of 1871 and 1876. Certain rules declare and provide the objects, government, and constitution of the union when registered under the act of 1871.

[402] The union had, at the time of the committal of the alleged cause of action, upwards of 60,000 members. The central governing body had its headquarters at Barnsley, consisting of a council and an executive council, with certain paid officials. There were some 150 branches, of which those of Denaby and Cadeby were important and numerous in membership. The government and business of the union and of its branches are

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controlled by a body of rules, of which the principal and most material may be summarized as follows: 4. The supreme government of the union is vested in a council consisting of certain named officers. 5. The council to meet once in every six weeks. Rules 28 and 29 create an executive committee of not less than thirteen members elected by the branches of the union. The duty of this committee is to deal with all matters of emergency arising between the meetings of the council, but the committee has no power to decide upon questions relating to strikes or lock-outs.

Rules 31 to 47 deal with the constitution and management of the branches. Rule 37 is as follows: "All local branches shall be conducted by a committee of not less than five or more than nine financial members, president, secretary, and treasurer included, whose duty shall be to attend all meetings, whether regular or special, and shall at all times transact the business of the branch as directed by the rules and minutes of the general council."

By rules 38, 39, 40, and 41 the mode of electing the branch committees and the method of dealing with the business of the branches are dealt with. Rule 46 deals with the manner in which the financial business of the branches shall be carried on. Rule 64 provides for the strike pay to members permitted to cease work by the sanction of the union in accordance with the rules, and by rule 72 no branch is allowed to strike or leave off work with the view of causing the works to stand, unless sanctioned by two thirds of the members composing the branch, when such strike shall be determined by registered ballot.

The effect of these rules seems to be very concisely and correctly stated by Cozens-Hardy, L.J., and I adopt the following portion of his judgment: "Now under these circumstances [403] it is clear that it is competent to the union to order or adopt a strike. Such action would ordinarily be taken only when the interests of the members as a whole are considered to be affected. But it is quite clear that it is contemplated that a branch as distinct from the union may strike. In that case great care is taken that the branch members shall have no claim for strike pay out of the union funds unless certain forms are complied with and the sanction of the council obtained. A local strike

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will naturally be engineered by the local branch officials, but in my opinion the branch officials are not agents of the union with authority to bind the union by their acts in a local strike. Such agency must be founded on something outside the rules, and its existence must be proved by those who rely upon it." Accepting this view, it becomes necessary to consider the facts proved outside the rules, in order to determine whether the liability of the defendants is established by such facts and occurrences apart from the effect of these rules.

It seems that in the spring of 1902 the local workmen in the Denaby and Cadeby collieries were in a state of discontent in consequence of the employers' attitude in relation to what was called the "bag dirt question." On Sunday, June 29, 1902, a meeting of the operatives at the two collieries was summoned, and was attended by some 300 or 400 miners. The following resolution was passed by them: "That this meeting is of opinion that the time has now arrived when some steps should be taken in reference to the reduction of men's wages for bag dirt and fines for different things at Denaby and Cadeby collieries, and that having tried to come to some amicable understanding and failed, the only thing that is left for us to do is to stop the wheels in both collieries."

The grievance as stated in this resolution appears to have been of a local character, but it was urged in argument on behalf of the plaintiffs that this resolution did not correctly set out the cause for the intended stoppage of the wheels, and that the real cause was the hostility entertained by the men throughout a large district towards the action of the conciliation board, which had lately by the casting vote of the chairman directed a reduction of the workmen's wages by 10 per cent throughout [404] the whole of the federated districts. But in my view this allegation was not supported by evidence. It is true that the decision to reduce the wages had lately been arrived at, and that in some twenty other collieries about this time strikes took place, but causes for these strikes were shown to exist and to be unconnected with the decision of the conciliation board. It must, therefore, be taken that the resolution correctly stated the grievance complained of, and that grievance was of a local and not of a general character.

The resolution thus passed was promptly acted on. According

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to the evidence of the manager of the collieries the first shift after the meeting was at 10 o'clock the same night. But the men at the two collieries did not go to work, and, having given no notices of discontinuance, they broke their contracts, committing an unlawful act, and the strike commenced. So far the decision to commit the unlawful act of breaking the contracts made by the individual workmen was the act of the two branches, and not of the central body. The latter, however, were promptly informed of the step that had been taken, and promptly dealt with it. On the next day, June 30, the executive committee met at Barnsley, Mr. Carey, the president, presiding, and passed the following resolution: "That Mr. Carey be instructed to wire the secretary of Denaby and Cadeby main branches, stating that in the opinion of this executive they ought to have a meeting and agree to resume work at once, as they are out contrary to the rules and regulations of the association." This resolution was confirmed at the council meeting of July 14, when it was arranged that certain members of the central body should proceed to the collieries and tell the men that they must resume work, and then take a ballot the first day they worked as to whether they would send in their notices to terminate their contract of service.

The representatives of the central body attended at the collieries in pursuance of the resolution, and in consequence of the advice given the workmen at the collieries resolved to resume work, but were met by a demand to sign a new contract of service. This contract contained a new term recognizing the validity of some rules recently made by the home office, and [**405**] thereupon the men refused to sign it. The employers declined to allow the men to return without a fresh contract, and so the collieries continued idle for many months.

At this time Mr. Pickard, the president of the association, and other members of the council, appear to have been advised that the men had not broken their contracts, and that therefore the masters, by refusing to allow them to continue their work under the original contracts, had locked them out. Apparently this view, however incorrect, was acted on, and on July 24 a resolution was passed granting strike pay from the day when the men offered to resume work, and were refused unless they signed a new contract.

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It should be noted that before any strike pay was voted the unlawfulness of the acts of the men had been clearly established. They had absented themselves from their work for a fortnight, whilst it was proved that an absence of some two or three days was regarded as establishing a discontinuance of service. "The strike" had thus commenced, but this word is of an artificial character, and does not represent any legal definition or description. The legal effect of what had occurred was that the men had wrongfully left their employment without giving the necessary fourteen days' notice; that therefore the contract between them and their employers was broken, and that the latter had the right to treat, and did treat, the different contracts of service as at an end. They also required, as I have said, that if the men sought to return to their work they must do so under fresh contracts of service, which, however, the men refused to recognize, and thus the nonemployment and the idleness of the mine continued until January, 1903.

Now, in respect of the period from June 29 to July 15, the members of the Court of Appeal were unanimous in holding that no liability attached to the trade union central body, and in such view I concur. I do so because I think that there is nothing to be found in the rules that makes the officers of the branches the agents of the central body, and also because I can find no evidence from which it can be shown that authority was given to the branches to act between those dates as such agents.

But the determination of the case is not yet arrived at. It [406] was further contended on the part of the plaintiffs that the acts of the defendants' union in granting strike pay and some individual acts established liability on account of what was termed maintaining the strike existing at the Denaby and Cadeby collieries. Importance must be attached to this argument in consequence of the judgment given by the learned Master of the Rolls upon the point thus raised. In relation to it consideration should be given to the term "maintaining the strike." If one assists in procuring the commission of an unlawful act, doubtless liability follows, and so if the defendants had done anything, by assistance or otherwise, to induce the branch workmen to break their contracts the union would have been liable. But no such inducing to break a contract was proved. When the assistance

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was given, that is, when strike pay was voted, the unlawful acts had been committed, all the contracts of employment were terminated, and employers and employed were in respect of contracts entirely unconnected. So that the effect of the grant of strike pay was not to cause or induce the commission of an unlawful act, but to place the workmen in the position of being able to maintain themselves without entering into a new contract of labor with the plaintiffs or with anyone else. This is no more than the subscribing to a strike fund. Within the last few years we have had instances of the public contributing largely towards the maintenance of men who had ceased to work under conditions which constituted what is called a strike. Were these subscribers liable to an action? It surely must be admitted that they were not, even if the workmen had broken their contracts.

Some other grounds of liability were alleged, but may be briefly dealt with. It was urged that the money of the union was unlawfully expended when applied to the strike pay granted. That may be so as between the members of the union and those who made the grant, so that an injunction could be obtained to restrain such payments. But this faulty application does not confer any cause of action upon the plaintiffs, who have no interest in the money misapplied. If the subscribing to a so-called strike fund is legal, the source from which the money subscribed is derived, however tainted, cannot create illegality.

[407] I concur also in the judgments given in the Court of Appeal that no acts of molestation were brought home to the union, and also that there was no legal ratification of the acts of the branch officials by the central body.

In relation to the liability of Parrott, Wadsworth, and Hall, I think it follows that of the union. Those men were not guilty of independent tortious acts. Nolan and Humphreys did not appear, and must be held to be liable, but probably that liability is of no importance to the plaintiffs.

For these reasons I think that the judgments of the majority of the Court of Appeal must be affirmed.

Lord Robertson: My Lords, I agree that this appeal should be dismissed, and I shall add a few words only on that part of the case on which the Court of Appeal was not unanimous.

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From the first part of the case, however, I carry forward this, which is my ground of judgment upon it, that the branch officials were not, as such, officers or agents of the respondent association; and this must be steadily kept in view on the question of maintenance, and indeed directly affects it. We start, then, with this, that the respondents were not responsible for the original breach of contract, or for those who caused it; and in fact, although on a somewhat narrow ground, they disapproved of what was done on June 29.

Now I do not profess to decide, and have no occasion to decide, more in favor of the respondents than that on the specific questions to which the findings of the jury on maintenance relate the appellants have not established liability. Those findings are in answer to the 6th question, and are lettered a, b, and c; and I shall consider c first, as it charges the only act which the association is said to have done directly by itself, *viz.*, the grant of strike pay. Now this grant was never made except to men whose contracts were at an end; and the payment was therefore not to induce men to break contracts, but to induce them not to enter into new contracts. So far there is no illegality. Nor do I see how the fact that the payment of this strike pay was held to be a violation of the internal constitution [408] of the association turns it into an invasion of any right of third parties like the appellants.

The answer to the charge lettered b (inducing or attempting to induce men who were willing to enter into contracts of service with the appellants, or to work for them, to refrain from so doing) is that it is not a legal wrong.

The question lettered a charges the respondents with molesting or intimidating men who were working for the appellants with a view of inducing them to cease from so working. The theory upon which this charge is made can only be that by giving financial support to the strike the respondents made themselves liable for all that was done during the strike by the officers of the branches. I am unable to adopt that view, and I do not find any other valid ground for attaching such liability.

The 9th query raises substantially the same questions under the form of conspiracy, for the *media concludendi* are in substance the same.

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The answers to the 7th and 8th queries are hopelessly ineffective, for the reason given by my noble and learned friend the Lord Chancellor.

Lord Atkinson: My Lords, I concur in the views that have been expressed by my noble and learned friends who have preceded me, and, as both the law and the facts have been so fully dealt with by them, I do not think it necessary to go over again the ground which has been traversed. I may, however, say shortly that I beg to adopt, if I may, the judgment delivered by Cozens-Hardy, L.J., in the Court of Appeal. I concur in the conclusion at which that learned judge arrived and in the reasoning by which he arrived at it.

Order of the Court of Appeal affirmed, and appeal dismissed, with costs. Lords' Journals, May 14, 1906.

Solicitors: *Johnson, Weatherall, & Sturt, for Broomhead, Wightman, & Moore, Sheffield; Corbin, Greener, & Cook, for Raley & Sons, Barnsley.*

Note.—Civil liability of trade union or its members for wrongful strike.

As to the liability of a labor union or its members to persons with whose employment it has interfered, see note to *Read* v. *Friendly Soc. O. S. M.* 1 B. R. C. 503.

"It is the right of every man, unless bound by contract to serve for a definite period, to leave at any time an employment which for any reason is distasteful to him, and this right is as perfect and complete as the correlative right of all men to seek employment wherever they can find it. While in some instances the statement has been made that men may quit their employment collectively as well as singly for any reason they see fit, this statement is not to be taken as denying, but only as failing to express, the qualification sometimes expressly appended, that the combination must be for the purpose of advancing their own interests by peaceable and lawful means, and not primarily to injure another,—except in those jurisdictions where the court have as yet failed to recognize the fact that the combination is an act in itself, and which therefore hold that under no circumstances can it be unlawful to combine to do an act which might lawfully be done in the absence of a combination. A strike is not, therefore, in itself an unlawful act even though its effect

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is to cause loss to the employer. The legality or illegality of a strike depends on the means by which it is enforced and on its objects; and the fact that the combination is for a lawful purpose does not render it less unlawful where the end is to be attained by the employment of improper means. . . . Since to violate one's contract is wrongful, it follows that a combination for such purpose is, where not justifiable, a combination to do a wrongful act, and hence an actionable conspiracy. Accordingly, a strike which involves a breaking by the strikers of their contracts of service, whether for a period measured by lapse of time or by the execution of piece work, is a wrong to the employer. So, in those jurisdictions which hold that knowingly to persuade another to break a contract without justification is unlawful, 'it is actionable to induce employees to strike in violation of their contracts of service." 1 Labatt, Mast. & S. §§ 2698, 2699.

So, the instigation of a strike in pursuance of an unlawful purpose is a wrong for which damages are recoverable. *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* (1894) 4 Inters. Com. Rep. 788, 62 Fed. 803; *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.* (1893) 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730.

Strikers who employ unlawful means in furtherance of the strike are liable to the employer for any damages he may suffer in consequence, such as loss of profits (*Berry Foundry Co.* v. *International Moulders' Union* (1914) 177 Mo. App. 84, 164 S. W. 245), damages consequent upon the enticing away of workmen (see *O'Neil* v. *Behanna* (1897) 182 Pa. 236, 38 L.R.A. 382, 61 Am. St. Rep. 702, 37 Atl. 843; *F. R. Patch Mfg. Co.* v. *Protection Lodge* (1905) 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74; *Metallic Roofing Co.* v. *Jose* (1905) 12 Ont. L. Rep. 200, reversed on another ground in [1908] A. C. 514, 24 Times L. R. 878), or the expense of employing counsel, guards about his factory, and of the maintenance of a commissary for feeding and caring for his employees to protect them from the unlawful efforts of pickets (*Jones* v. *Maher* (1909) 62 Misc. 388, 116 N. Y. Supp. 180, affirmed without opinion in 141 App. Div. 919, 125 N. Y. Supp. 1126).

All who participate personally in the unlawful conduct of strikers, or in such combinations as make them liable for the acts of others done in pursuance of the common purpose, are liable for the damages done in execution of such purpose. See *O'Neil* v. *Behanna* (1897) 182 Pa. 236, 38 L.R.A. 382, 61 Am. St. Rep. 702, 37 Atl. 843; *Emerson* v. *Cochran* (1886) 111 Pa. 619, 4 Atl. 498; *Dayton Mfg. Co.* v. *Metal Polishers, B. P. & B. W. Union* (1901) 11 Ohio S. & C. P. Dec. 643.

A union or a trades council may be held liable for wrongful acts done in furtherance of a strike where the circumstances are such as

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to indicate that they were contemplated as a probable incident of an authorized strike.

Thus, a union which has ordered a strike, and encouraged it for the payment of wages to individuals to carry it on, must be held accountable for all the results that can properly be traced to the original action, such as acts of violence, intimidation, and coercion exercised against the employers' remaining employees. *Connett* v. *United Hatters* (1909) 76 N. J. Eq. 202, 74 Atl. 188.

Voluntary unincorporated labor associations which have maintained the strike by money contributions made at frequent and stated intervals to support the strikers, and especially the picketing, may be held to have aided and abetted those wrongful acts on the part of the pickets which were done so openly and regularly that anyone interested in the conduct of the strike could, by the least observation or inquiry, have ascertained them at any time. *Jones* v. *Maher, supra.*

A trades council occupying the relation of a co-operative organization composed of delegates from the various unions may be held to be liable as an accessory to unlawful acts committed in the course of the strike, under evidence and admission showing official action giving it countenance and support, and the furnishing of money to the union under circumstances showing knowledge that the funds were to be used in the aid of the strike, and evidence showing direct participation in the details of carrying on a campaign of so-called "persuasion" by and through its walking delegate or its agent. *Hillenbrand* v. *Building Trades Council* (1904) 14 Ohio S. & C. P. Dec. 628.

In *Cotter* v. *Osborne* (1909) 18 Manitoba L. Rep. 471, it was held that where the evidence showed that the question of calling a strike was debated at a general meeting of the union, put to a vote and carried by a majority, that the strike was apparently approved by the general organization, which sent a representative to assist the members of the local union in carrying on the strike and sent them funds for the purpose, the union as an association of persons was civilly responsible for the act proved to have been committed.

But the members of a labor union which is a voluntary association are not responsible for a tort of other members unless they have authorized or participated in it, or have aided in some way in its perpetration after knowledge of the illegal purpose or facts from which such knowledge may be inferred. *Hill* v. *Eagle Glass & Mfg. Co.* (1915) 135 C. C. A. 417, 219 Fed. 719.

A union is not responsible for the unlawful act of its individual members which neither its officers nor committees directed nor approved, unless committed in carrying out their orders. *Aluminum Castings Co.* v. *Local No. 84* (1912) 197 Fed. 221.

And see also in this connection the observation of Lord Robertson in DENABY & C. MAIN COLLIERIES v. YORKSHIRE MINERS' ASSO. to

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the effect that the central organization by granting strike pay does not make itself liable for illegal unauthorized acts.

A labor organization cannot escape liability for the acts of its members which are the direct result of the strike which it has inaugurated, or of measures employed by it, on the ground that its officers advised the members to be orderly and obey the law. See *Franklin Union* v. *People* (1905) 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; *Goldfield Consol. Mines Co.* v. *Goldfield Miners' Union* (1908) 159 Fed. 500; *Southern R. Co.* v. *Machinists' Local Union* (1901) 111 Fed. 49.

Where a strike is for an illegal purpose (*Reynolds* v. *Davis* (1908) 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457), or is wrongful by reason of the strikers having broken their contracts with the employer (*Smithies* v. *National Asso.* [1909] 1 K. B. 310, 25 Times L. R. 205, 58 L. J. K. B. N. S. 259, 100 L. T. N. S. 172), the payment of strike benefits in furtherance thereof is an invasion of the employers' rights. But where a strike which was wrongful because of the workmen's violation of their contract to work for a definite period becomes lawful by reason of the employer's refusal to permit the workmen to return unless they will enter into new contracts of service on new terms, thereby treating the old contracts as rescinded, a labor organization which thereafter grants strike pay to the strikers is not liable for the damages occasioned by the continuance of the strike. DENABY & C. MAIN COLLIERIES v. YORKSHIRE MINERS' ASSO.

It is immaterial that in originally sanctioning a strike the union acted in ignorance of the existence of contracts broken by the strikers, where, after becoming aware of such contracts, it gave the workmen strike pay in order to keep them out on strike, thereby procuring them to commit a continuing breach of the contracts binding them to serve their employer for the residue of the unexpired terms. *Smithies* v. *National Association, supra;* distinguishing DENABY & C. MAIN COLLIERIES v. YORKSHIRE MINERS' ASSO. on the ground that there the master, before the union approved and supported the action of the men, insisted on new terms of employment as a condition of taking the men back; so that the union was but supporting the men in acts which were rightful. E. S. O.

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[ENGLISH COURT OF APPEAL.]

HAMBRO *v.* BURNAND and Others.

[1904] 2 K. B. 10.
Also Reported in 73 L. J. K. B. N. S. 669, 52 Week. Rep. 583, 90 L. T. N. S. 803, 20 Times L. R. 398, 9 Com. Cas. 251.

Principal and agent — Authority of agent — Contract made by agent in name of principal, but in his own interests — Liability of principal.

Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted bona fide, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, and not in those of his principal.

(March 25, 1904.)

APPEAL by the plaintiffs other than Burnand from the judgment of Bigham, J., in an action tried by him without a jury. [1903] 2 K. B. 399, 72 L. J. K. B. N. S. 662, 51 Week. Rep. 652, 89 L. T. N. S. 180, 19 Times L. R. 584, 8 Com. Cas. 252.

The action was brought against five defendants upon a guaranty policy in the following terms:

To Messrs. C. J. Hambro & Son:—

In consideration of your accepting at our request the drafts of Henry Gaze & Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from October 1, 1902, and in consideration of the premium of 1 per cent paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that, if the drawers do not at or before maturity of any such drafts put you in funds to meet the same, we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges, and ex-

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penses which you may have to pay, or to which you may be put by reason of your having accepted such drafts, or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto, [11] with interest thereon at the rate of 5 per cent per annum from the time of payment being demanded."

The policy was subscribed with the names of the five defendants, the names being all subscribed in the handwriting of Burnand. On October 9, 1902, the plaintiffs accepted a draft of Henry Gaze & Sons, Limited, at ninety days' sight, for 1,000*l*. The bill fell due on January 10, 1903, and Henry Gaze & Sons made default in finding money to meet it. Thereupon the plaintiffs claimed under the policy sued on to be paid by each of the five defendants his proportion, namely, 200*l*. of the amount.

The facts of the case, and the circumstances under which the policy sued upon was executed, are very fully set out in the judgment of Bigham, J., in the court below ([1903] 2 K. B. 399), to which the reader is referred. The following summary of the facts as found by the learned judge will, it is thought, be sufficient for the purposes of this report. Each of the defendants other than Burnand had given to the latter, who was a member of Lloyd's, an authority in writing, which, in substance, authorized Burnand to act as his agent for the purpose of underwriting policies of insurance, and carrying on the ordinary business of an underwriter, at Lloyd's, in his name and behalf, in accordance with the usual custom at Lloyd's. The written authorities so given to Burnand by the other defendants were never shown, nor was their existence known, to the plaintiffs.

At the end of the year 1899 an arrangement was made between a company, called Henry Gaze & Sons, Limited, and the plaintiffs, under which the company was financed by the plaintiffs, who were bankers, in the following manner: The plaintiffs accepted the drafts of Henry Gaze & Sons, Limited, which the latter got discounted, and they, by way of security, obtained and delivered to the plaintiffs guaranty policies similar to that above mentioned. Some of these policies were underwritten by Burnand in the names of himself and his codefendants, and by other underwriters, and others by other underwriters. In No-

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vember, 1900, the amount afloat of the drafts so accepted by the plaintiffs had reached 14,500*l.* After [12] that date various sums were paid by Henry Gaze & Sons in reduction of the amount of their obligations to the plaintiffs, so that at the end of 1901 the bills afloat only amounted to 7,500*l.* These bills were renewed from time to time during the year 1902, fresh policies being given to the plaintiffs to secure the amounts of the bills so renewed, the last of which was the policy upon which the action was brought. The later policies given to secure the renewed bills were only signed by Burnand in his name and the names of the other defendants, the other underwriters, whose names had appeared on the policies given in 1900, no longer being parties. Burnand became in August, 1900, a director of Henry Gaze & Sons, Limited, and was personally engaged in financial dealings with that company. Before the end of 1900, the plaintiffs became aware of the fact that he was a director of the company, but they knew no more than that fact would convey to them. It appeared that no premiums had ever been paid by Henry Gaze & Sons on these policies. Burnand never entered them in his business books, or introduced them into any of the accounts which he rendered to the other defendants, and he had intercepted letters addressed to them for the purpose of preventing them from becoming aware of the existence of these policies. Bigham, J., was of opinion upon the evidence that Henry Gaze & Sons, Limited, was not solvent when the first advances were obtained from the plaintiffs, and that its financial position afterwards became rapidly worse; and that Burnand, knowing what its position was, and desiring to keep it afloat, was, in underwriting the guaranty policies before mentioned (including that sued upon), acting for himself and in furtherance of his own interests, and not for or in the interest of the other defendants. He found upon the evidence as a fact that it was in the ordinary course of an underwriter's business at Lloyd's to underwrite such policies; but that, under the circumstances before mentioned, the defendant Burnand could not be considered to have signed the policy sued upon on behalf of, or within the scope of the authority given by, the other defendants; and he therefore gave judgment for the plaintiffs against Burnand only, and for the other four defendants. The plaintiffs ap-

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pealed, and the [13] defendants other than Burnand gave notice of contention by way of cross appeal against the finding of the learned judge that the underwriting of such a policy as that sued on was in the ordinary course of the business of an underwriter at Lloyd's.

Asquith, K.C., and **Scrutton**, K.C. (**Mackinnon** with them), for the plaintiffs. The evidence abundantly justified the learned judge in finding as a fact that the underwriting of guaranty policies, like that sued on, was in the ordinary course of the business of an underwriter at Lloyd's. That being so, the defendant Burnand, in underwriting this policy in the names of his codefendants, was acting within the express terms of the authority given to him. The learned judge treated it as open to the defendants other than Burnand to set up that, though the policy was signed with their names as principals, and was within the terms of the authority given to him, it was really made by Burnand for himself alone and for his own purposes. The case of *Keighley, Maxsted & Co.* v. *Durant* [1901] A. C. 240, 70 L. J. K. B. N. S. 662, 84 L. T. N. S. 777, 17 Times L. R. 527, shows that this contention is inadmissible. In that case a person who was alleged to have intended to contract on behalf of a third party, but without his authority, made a contract, not professing to act on behalf of a principal, and it was held that it was not competent for the third party to ratify the contract, because the intention of the agent could not be inquired into for the purpose of altering the contract as made. On the same principle, the agent here having professed to contract for principals, and having been in fact authorized by them so to contract, the state of his mind cannot be inquired into, in order to show that he was not really exercising his authority, and did not so contract. Moreover, it is impossible to say that the defendant Burnand did not intend to contract on behalf of his principals; for it is obvious that he did intend to contract for them as well as himself, and he was authorized to do so. It cannot be contended that he contracted for himself only, or that he was not authorized to make the contract, because, in doing so, he regarded his own interests, and not the interests of his [14] principals, and his conduct, as between himself and them, was

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a breach of his duty as agent. The plaintiffs cannot stand in a worse position than if they had asked to see, and had been shown, the written authorities under which Burnand acted. On their being shown those authorities, and finding that they authorized him to underwrite the policy, it could not be incumbent upon them to institute an inquiry for the purpose of ascertaining whether he was acting bona fide in the interests of his principals, or was actuated by any indirect motives. Business could not be carried on upon such terms. Bigham, J., was impressed with the judgment of Nelson, C.J., the dissentient judge, in the American case, *North River Bank* v. *Aymar* (1842) 3 Hill, 262; but the point has since been dealt with in other American cases, which were not brought to his attention, and has now been settled adversely to the view taken by Nelson, C.J., and in favor of that expressed by the majority in the former case. See *Exchange Bank* v. *Monteath* (1863) 26 N. Y. 505; *New York and Newhaven Railroad Co.* v. *Schuyler* (1865) 34 N. Y. 30; *President, &c., of Westfield Bank* v. *Cornen* (1867) 37 N. Y. 320, 93 Am. Dec. 573. A passage in the judgment of Lord Brougham in *Bank of Bengal* v. *Fagan* (1849) 7 Moore, P. C. C. 61 at p. 74, is most strongly against the contention of the defendants; and in the case of *Bryant, Powis & Bryant* v. *Quebec Bank* [1893] A. C. 170, at p. 180, 62 L. J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council, adopts the view taken by the American Court in *President, &c., of the Westfield Bank* v. *Cornen* (1867) 37 N. Y. 320, 93 Am. Dec. 573.

[They also cited *Montaignac* v. *Shitta* (1890) 15 App. Cas. 357; *In re Tiedemann and Ledermann Frères* [1899] 2 Q. B. 66, 68 L. J. Q. B. N. S. 852, 81 L. T. N. S. 191; Story on Agency, 9th ed. § 73, p. 91; *Summers* v. *Solomon* (1857) 7 El. & Bl. 879, 26 L. J. Q. B. N. S. 301, 3 Jur. N. S. 962, 5 Week. Rep. 660.]

Montague Lush, K.C., and **A. J. Ashton** (**Isaacs**, K.C., and **Maurice Hill**, with them), for the defendants other than Burnand. They argued, first, that, upon the evidence, the finding of the learned judge that the underwriting of guaranty policies

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was [15] in the ordinary course of the business of an underwriter at Lloyd's was wrong.

Secondly, it is submitted that the view of the law taken by Bigham, J., was right. It is most material in the first place to observe that there was no evidence in this case of any holding out of Burnand by his codefendants as their agent to sign such policies. It was not suggested on the part of the plaintiffs that there had been anything in the nature of such a holding out, so as to create an estoppel against the codefendants of Burnand. The written authorities were never shown or communicated to the plaintiffs. They really have nothing to do with the case further than as showing what authority Burnand would have had if he had really acted for his principals. They did not influence the plaintiffs in any way; and the case stands on the same footing as any other case in which a person contracts with another on the representation necessarily implied by his professing to act on behalf of a principal, and takes the risk whether that representation is true or not. In the absence of anything in the nature of an estoppel against the defendants by holding out Burnand as their agent, it is submitted that, if Burnand could not be said to be acting in the exercise of the authority given to him as between himself and his principals, the plaintiffs cannot stand in a better position than Burnand. As between himself and his principals, Burnand, in underwriting the policy, was not acting in pursuance of his authority, but solely in his own interests, and for his own purposes: namely, for the purpose of upholding Gaze & Sons, Limited, which he was personally interested in keeping afloat. The object of the mandates given to him was that he might invest his principals' money in the business of insurance so as on a balance of risks to make a profit for his principals. That was not the object with which Burnand underwrote these policies. He incurred liabilities on behalf of each of his codefendants to an amount exceeding 20,000*l.* on one risk; namely, the solvency of Gaze & Sons. No premiums ever appear to have been paid upon these policies by Gaze & Sons. The policies were never entered in Burnand's books, and he never introduced them into any accounts rendered to the other defendants. He intercepted letters addressed to them in order [16] to keep from them any knowledge of these policies.

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It surely cannot be said that such a course of action comes within an authority to deal in the ordinary course of business at Lloyd's. It may be that, if there had been evidence that Burnand had been held out as having authority to underwrite these policies by his codefendants, then they would have been liable, notwithstanding the fact that, as between him and his principals, his conduct was a breach of his duty as an agent. But, where the case is simply one in which a person contracts with another who professes to act for a principal, which is all that this case amounts to, it is submitted that the authorities show that the question is whether the supposed agent was in truth acting within the scope of his authority. If he was not, though he professed to be so acting, the person contracting with him, who has, in so contracting, trusted to his representation, and has not acted on the faith of anything done by the principal, takes the risk, and must bear the loss upon its turning out that the agent was not in truth acting within the scope of his authority. The cases of *Bank of Bengal* v. *Fagan* (1849) 7 Moore, P. C. C. 61, and *Bryant, Powis & Bryant* v. *Quebec Bank* [1893] A. C. 170, 62 L. J. C. P. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, appear to have related to negotiable instruments, and to have turned upon the doctrine of the law merchant with regard to the position of a bona fide holder for value of such an instrument.

[**Romer, L.J.**: The decision in *Bryant, Powis & Bryant* v. *Quebec Bank* [1893] A. C. 170, 62 L. J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, could hardly have depended upon that doctrine, for the indorsements appear to have been *per pro,* which would have been notice to the holder that they were made under a special authority.]

[They also cited *Grant* v. *Norway* (1851) 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258; *George Whitechurch, Ld.* v. *Cavanagh* [1902] A. C. 117, 71 L. J. K. B. N. S. 400, 50 Week. Rep. 218; *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150; *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317, 42 L. T. N. S. 194, 28 Week. Rep. 677; *Coleman* v. *Riches* (1855) 16 C. B. 104, 3 C. L.

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R. 795, 24 L. J. C. P. N. S. 125, 1 Jur. N. S. 596, 3 Week. Rep. 453; *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298; *Salomons* v. *Pender* (1865) 3 Hurlst. & C. 639, 34 L. J. Exch. N. S. 95, 11 Jur. N. S. 432, 12 L. T. N. S. 267, 13 Week. Rep. 637; Story on Agency, 9th ed. § 133, p. 149.]

[17] The circumstances were such as ought to have excited the suspicions of the plaintiffs, and put them on inquiry as to whether Burnand was acting bona fide in underwriting these policies in the names of the other defendants.

Scrutton, K. C., in reply.

Collins, M.R.: The question raised by this appeal is one of great importance; but, after the assistance which we have received from the arguments of counsel, and reference to authorities which were not before Bigham, J., I entertain no doubt on the matter, and I do not think that anything would be gained by taking time to consider our judgment. The action is brought by the plaintiffs, who had arranged with Gaze & Sons, Limited, to accept drafts drawn by that company on condition that they should be secured by what have been called guaranty policies, upon a policy dated October 1, 1902, which was underwritten by the defendant Burnand in his own name and in the names of the four other defendants, who had respectively given him written authorities to underwrite risks on their behalf at Lloyd's in very wide terms. The policy sued upon is one of a series of similar policies given by Gaze & Sons to the plaintiffs. It is unnecessary to go through the whole series in detail. They were all connected together; certain policies had been originally given in respect of transactions in the year 1900, and the policies given subsequently to 1900 were by way of renewal of policies given in that year, the policy sued upon being the last of such renewals. Written authority had been given by each of the other defendants to Burnand to act as his agent for the purpose of underwriting policies, and of carrying on the business of an underwriter at Lloyd's. I will read the authority given by the defendant Read, as having been the most frequently referred to during the argument; but I do not think that there is any

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real distinction between that and the others. It is, leaving out immaterial portions, as follows. After reciting that Read is desirous of carrying on the business of an underwriter at Lloyd's in manner thereinafter mentioned, and of appointing Burnand to conduct such business on his behalf, and that he [18] has paid a certain sum into a bank to be used for the purposes of the business, it provides that "the said Percy George Calvert Burnand shall act, for a period of three years certain, commencing as from August 19, 1891, and terminating on December 31, 1894, and thereafter from year to year, subject to six months' notice in writing by either party, such notice to terminate on December 31 in any year, as the agent of the said Robert Arthur Read, for the purpose of underwriting policies of insurance at Lloyd's, and carrying on the ordinary business of an underwriter at Lloyd's (hereinafter called 'the business') in the name, and on behalf, of the said Robert Arthur Read, in accordance with the usual custom of Lloyd's, and upon the terms and conditions hereinafter contained. The said Percy George Calvert Burnand shall during the said period have the sole management of the business, and all risks shall be taken, and all losses, averages, and returns shall be settled, by him in the name and on account of the said Robert Arthur Read; and the risks to be taken, and the claims to be settled, shall be left to the discretion of the said Percy George Calvert Burnand, and the said Robert Arthur Read shall sign the necessary authority for that purpose to the bankers. The said account shall be devoted solely to the purposes of the business, but subject thereto and to the winding up of the business at the termination of the agency, it shall belong to the said Robert Arthur Read absolutely." Then followed provisions as to keeping accounts of the business, the remuneration to be paid to Burnand, and other matters. There is no doubt that the indebtedness of Gaze & Sons to the plaintiffs, and the aggregate of the liabilities undertaken by Burnand on these policies, became in process of time very large, and, ultimately, the amount secured by the policy of October 1, 1902, not being paid, this action was brought.

The defendants other than Burnand set up two defenses.

They say, first, that they are not liable, because the authority given by them to the defendant Burnand was limited to the

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purpose of underwriting policies of insurance, and carrying on the ordinary business of an underwriter at Lloyd's, in accordance with the usual custom of Lloyd's, and the underwriting [19] of guaranty policies, such as that sued on, is not part of the ordinary business of an underwriter at Lloyd's. Whether that is so or not is a question of fact.

Secondly, they say that, as a matter of law, having regard to the inferences of fact drawn by Bigham, J., as to the motives which led Burnand to underwrite the policy, and his relation to Gaze & Sons, that he undertook this liability on their behalf without their authority.

I will deal first with the question of fact. Bigham, J., after hearing the evidence of the witnesses called before him, was of opinion that the weight of that evidence was strongly in favor of the view that this class of business, namely, underwriting guaranty policies, was part of the ordinary business of an underwriter at Lloyd's. It had to be admitted on the part of the defendants that the underwriting of what are called "solvency policies" formed part of that business. The only distinction between those policies and the so-called guaranty policies is that in the one case the underwriter undertakes to pay in the event of the insolvency of a debtor, and in the other he undertakes to pay in the event of nonpayment by the debtor. The question is one of fact, and the learned judge acted on what appeared to him a clear preponderance of evidence to the effect that there was no distinction for this purpose between the two kinds of policy, or, even if there was, that it was part of the ordinary business of an underwriter at Lloyd's to underwrite guaranty policies. It appears to me that there was abundant evidence to justify the learned judge, exercising the functions of a jury-man, in coming to the conclusion of fact at which he arrived.

I now come to the question of law which has been discussed before us. It has been contended for the appellants that, although express authority was given in writing, as in the present case, authorizing an agent to make such a contract as he has made, it is open to the principal to say that, nevertheless, if it appears, on inquiring into the motives which existed in the agent's mind, that he intended, in making the contract, to misuse for his own ends the opportunity given to him by his author-

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ity, and apply it to a purpose which, if the [20] principal had known of it, he would not have sanctioned, then, because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him. I should have said myself, apart from authority on the subject, that such a proposition could not hold water. I am somewhat surprised to find that, in an American case, a view favorable to it has been taken by one of the judges. I gather that it was in consequence of what was said in that case that Bigham, J., for whose opinion on a commercial point I have the greatest respect, was led to the conclusion which he adopted. The case of *North River Bank* v. *Aymar* (1842) 3 Hill, 262, was cited to him, in which there was a difference of opinion between the judges, one of them adopting the view that, though an agent had acted within the terms of his authority, it was competent to the court to look into the mind of the agent, and, if he had misapplied his authority for his own purposes, the principal was not bound. The other two judges did not agree with that view. Bigham, J., after examining the reasons given in that case, came to the conclusion that the reasoning of the dissentient judge was the stronger; and, not being fully apprised of the present state of the American authorities, he decided on similar grounds that the principals in the case before him were not liable for the act of the agent. But since that case the question has been mooted several times in America, and ultimately the American courts have authoritatively laid it down as the true principle that, where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted. It would be impossible, as it seems to me, for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and inquire whether his motives did or did not involve the application of the authority for his own private purposes. The matter, however, does not rest there, for the view which has been ultimately established in the United States by a strong concatenation of American authorities [21] appears to have been anticipated in England, and at length finally adopted in a recent decision of the Judicial Committee of the Privy Council. There is a very remarkable passage in

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the judgment delivered by Lord Brougham in the year 1849 in the case of *Bank of Bengal* v. *Fagan* (1849) 7 Moore, P. C. C. 61, at p. 74. He said: "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying that, what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and, though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." That passage seems by anticipation to deal with the very point which was the salient point of the judgment of Bigham, J., in this case and of the argument before us. In the case of *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* [1893] A. C. 170, Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council, says: "The law appears to their Lordships to be very well stated in the Court of Appeal in the state of New York in *President, &c., of the Westfield Bank* v. *Cornen* (1867) 37 N. Y. 320, 93 Am. Dec. 573, cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: 'Whenever the very act of the agent is authorized by the terms of the power, that is whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts [22] *aliunde*. The apparent authority is the real authority.'" That passage, as pointed out by the plaintiffs' counsel, though acted on and adopted by the Court of Appeal of New York, was taken from the language of the majority of the judges in the first-mentioned American case. So that, after a series of cases, that is the final view of the courts in America,

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which has been adopted by the Judicial Committee of the Privy Council. The defendants' counsel sought to distinguish the case of *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* [1893] A. C. 170, 62 L. J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, on the ground that it related to a negotiable instrument in the hands of a bona fide holder for valuable consideration. But, as Romer, L.J., has pointed out, it appears that the agent who indorsed the bills in that case indorsed them *per pro,* thereby giving notice to anyone who took the bill of the fact that he was acting within the terms of a special authority. It is not *ad rem,* therefore, to say that the case concerned a negotiable instrument; the rights of the person who took the bill under such circumstances had to be measured by the authority given to the agent. It seems to me that the law on the subject is clearly established, and therefore the ground of the judgment of Bigham, J., fails. That being so, it is really unnecessary for me to go into the various matters relied upon by the defendants in relation to the question whether, in underwriting the policy, Burnand was acting for his own benefit, and in his own interests, and not in those of the other defendants. On the view which I have taken, the plaintiffs were not concerned to inquire into those matters, and they do not affect their right to recover upon the contract which was made by the defendant Burnand with the authority of the other defendants. On these grounds I think the appeal must be allowed.

Romer, L.J.: I am of the same opinion. With regard to the first question arising in this appeal, which is one of fact, I have come to the same conclusion as Bigham, J. The written agreements, which conferred authority on the defendant Burnand to underwrite policies on behalf of his codefendants, were entered into by men of business, who must be presumed [23] to have known the practice and course of business at Lloyd's, and must be construed accordingly; and, having regard to the evidence given as to the practice of underwriters at Lloyd's, without going through it in detail, I think it is enough to say that I am satisfied that, by the terms of the written authorities given by his codefendants to Burnand, he was empowered to underwrite guaranty policies, such as that sued upon in this case, on their behalf.

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There remains the question of law. I will first say a few words on that as a matter of principle. We have here an authority given to an agent to underwrite policies for his principals, expressly stating what powers are conferred upon him. If the agent, in underwriting a policy in the principal's name, acted within the scope of that written authority, it appears to me on principle that, as regards a person taking in good faith and for valuable consideration the policy so underwritten, it is binding on the principal, who cannot escape from liability merely because the agent may have abused the authority or betrayed his trust. Consider how the case would have stood if the plaintiffs in this case, who accepted the guaranty policies, had not relied merely on the representation which Burnand necessarily made to them by professing to sign the policies on behalf of his codefendants. The utmost which, it appears to me, they need have done, as between themselves and the principals of the agent, was to ask the agent to produce his written authority, if he had any. Had they done that, and had that authority been shown to them, it would have been hopeless, in my opinion, for the principals of the agent afterwards to say that they were not bound by the written authority so inspected because the agent had acted in bad faith towards them in acting upon that authority. As a matter of principle this appears to me so clear that I will not further consider the point. Then does it make any difference that in point of fact the plaintiffs did not inspect the authority? I think not, for this reason. By not inquiring for the written authority, they no doubt ran a certain risk. What was that risk? The agent represents that he has authority by reason of the fact that he signs the policy in the names of his coinsurers. If the plaintiffs [24] do not ask to see his authority, upon what are they relying? They rely—and that is the only risk which they run—upon his representation that he has authority to enter into the contract. How can it be argued that the principals are not liable on the contract when it turns out that, to the extent to which the plaintiffs trusted the agent, they were justified in trusting him, and that, to the extent to which he made a representation of authority, he was justified in making such a representation? It seems to me that the plaintiffs are really in the same position as if they had asked to see the written au-

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thority, and it had been produced to them. It is said that the existence of the written authority not being known to the plaintiffs was immaterial, and that Burnand, having been capable in this case of fraud and misconduct towards his principals, would have been equally capable of representing that he had authority, even if he had not had it. Burnand has not been represented in this appeal; but, assuming for the present purpose that his conduct was such as suggested, I think that the argument is entirely fallacious. I should say that there are few things clearer than that a man, who might not shrink from such misconduct, would shrink from signing the names of others to instruments without authority, for the very good reason that doing so might involve great risk of making himself liable to criminal proceedings of an extremely serious character. It seems to me very unlikely that Burnand would have signed these policies in the name of his codefendants unless he had had and relied upon the written authority given to him. I think, therefore, that on principle the point of law ought to be decided in favor of the plaintiffs.

As to the authorities, after what the Master of the Rolls has said, I wish to say a few words only. I think the cases cited for the defendants which concerned the relation of master and servant are not applicable to the present case. In those cases the sole question was as to the authority by implication conferred by a master upon a servant. They have nothing to do with a case where there is an express authority in writing. Further, I agree with the Master of the Rolls that the point has been decided in this country, if not before, by the case of [25] *Bryant, Powis & Bryant* v. *Quebec Bank* [1893] A. C. 170, 62 L. J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, to which we have been referred. Therefore, both on principle and authority, I think the point of law ought to be decided contrary to the view which Bigham, J., took.

In conclusion I wish to say that, although, upon the terms of the written authority given, the signing of the policies by the defendant Burnand was within the scope of his authority as agent, yet, if the plaintiffs had taken them with notice of the fraud of the agent, they would not have been entitled to recover upon them against the persons defrauded. The defend-

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ants, however, appear to me to have altogether failed to establish any such case. All that could be said was that it was known to the plaintiffs that Burnand was a director of Gaze & Sons at the time when the policy sued upon was executed; but that knowledge did not, as it seems to me, *per se* affect them with notice that he occupied a position which rendered it impossible for him properly to act as an agent for his codefendants in signing these policies. I cannot see any evidence in this case which shows anything in the nature of knowledge on the part of the plaintiffs, either direct or indirect, of any misconduct on the part of Burnand which ought to have put them on inquiry, or could absolve the codefendants of Burnand from liability on the policy.

Mathew, L.J.: I agree. The exhaustive judgments which have been already delivered relieve me of any necessity for doing more than briefly expressing the reasons why I concur in them. The first question is one of fact; namely, whether the policy sued upon was such as would in the ordinary course of business be effected with underwriters at Lloyd's. The learned judge has found that it was, and I think that the evidence as a whole pointed clearly to the conclusion at which he has arrived.

With regard to the point of law, it appears to me that it would be fatal to the transaction of mercantile business, if persons dealing with brokers or other agents were bound to inquire into the motives with which they seek to contract [26] on behalf of their principals. In this case the defendant Burnand, who was an underwriter, had authority to act as agent for the other defendants at Lloyd's. The authority was in each case given to him by a written document. The persons dealing with him were not likely to inquire for those documents, but there they were, if called for; and I agree that the position is really the same as if the plaintiffs had asked to inspect the documents in order to see what the authority was, and had been allowed to do so. Could it in such case be suggested that, after inspecting the documents, the plaintiffs would then be bound to inquire into the motives which actuated the agent in acting upon them? How could such an inquiry, practically, be made? Any inquiry of that kind would be regarded by the agent as an affront. It seems to me unreasonable to suggest that it was incumbent on

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the plaintiffs, in dealing with Burnand, first to insist on seeing the document under which he was acting as agent, and then to enter into an investigation as to his relation to Gaze & Sons, and the absence of any indirect and dishonest motives on his part in making the contract. The defendants, who made Burnand their agent, would know that credit would be given to him without any such proceeding. There does not appear to be any authority to show that such an inquiry is required of a person dealing with an agent. Bigham, J., seems to have acted upon the case of *North River Bank* v. *Aymar* (1842) 3 Hill, 262, in the United States. But the later American authorities have quite disposed of the suggestion that such a burden is cast upon a person dealing with an agent. It is enough for us to say that it appears to be well settled in English law that the liability of a principal on a contract entered into by his agent within the terms of his authority cannot be affected by the unknown motives by which the agent was actuated in making the contract. The passage from the judgment of Lord Brougham in *Bank of Bengal* v. *Fagan* (1849) 7 Moore, P. C. C. 61, which has been cited, the passage from Story on Agency, 9th ed. § 73, p. 91, and the case of *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* [1893] A. C. 170, 62 L. J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, in my [27] opinion establish the law on the subject, and show that no such doctrine as we are asked by the defendants' counsel to adopt is maintainable.

Appeal allowed.

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*

Solicitors for defendants other than Burnand: *Merriman, Pike, & Merriman; R. A. Read, Jun.; Ward, Bowie, & Company; Church, Rendell, & Company, for J. B. Clarke & Company, Birmingham.*

Note.—Liability of principal on contract negotiated by agent having apparent authority, as affected by fact that agent acted for his own interest.

This note does not cover cases of special agents, as brokers, factors, etc.

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Neither does it include cases such as *Yellow Poplar Lumber Co.* v. *Daniel* (1901) 48 C. C. A. 204, 109 Fed. 39, writ of certiorari denied in 183 U. S. 696, 46 L. ed. 395, 22 Sup. Ct. Rep. 933, where the fraud of the agent was apparently not contemplated at the time he attempted to exercise his power, but originated afterward.

Nor cases such as *Claflin* v. *Farmers' & Citizens' Bank* (1861) 36 Barb. 540, reversed on other grounds in 25 N. Y. 293, where the decision rests upon the fact that the party seeking to recover was a bona fide holder of a negotiable instrument.

The note deals with the liability of an innocent principal to an innocent third person on a contract which was apparently within the agent's authority to make, but in the making of which he fraudulently acted for his own benefit.

Where a party dealing with an agent has knowledge that the agent is abusing his authority and using it for his own interest, or where he has knowledge of facts from which he is chargeable with notice of such fraud on the principal, it seems clear that he, and not the principal, should bear the loss resulting. But where the party dealing with the agent in a matter apparently within the scope of his authority has no knowledge of the agent's fraud, or cognizance of facts charging him with knowledge thereof, it appears to be a sound rule of law that the principal, who has selected his representative and vested him with apparent authority, should be the loser, and not the innocent party who has relied thereon.

And this is the view taken by the courts.

Thus in *North River Bank* v. *Aymar* (1842) 3 Hill, 262, which appears to be a leading case upon the question under consideration, where a power of attorney was given to an agent to draw and indorse notes in the name of the principal, the latter was held liable to a bank with which the power of attorney was filed, on notes indorsed to it purporting to have been executed by the agent for the principal, but in fact executed by the agent for the accommodation of a firm of which he was a member.

And in *Exchange Bank* v. *Monteath* (1863) 26 N. Y. 505, where an agent was authorized to draw, indorse, and accept checks, drafts, and bills of exchange for the use and benefit of the principal's business, the latter was held liable to an innocent holder of drafts, although they were drawn by the agent for the use and accommodation of a bank which was in a failing condition and of which the agent was a director, since, by reason of the authority given, the principal made it possible for the agent to commit the fraud.

And in *Bryant* v. *Quebec* [1893] A. C. 170, 62 L. J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, where an agent indorsed promissory notes as agent, and his act was within the apparent scope of his authority, it was held that the principal

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was liable on the notes to an innocent holder, although the agent acted for his own benefit.

So, in *Bank of Bengal* v. *Macleod* (1849) 7 Moore, P. C. 35, 13 Jur. 945, and *Bank of Bengal* v. *Fagan* (1849) 7 Moore, P. C. C. 61, a principal who had authorized its agent to indorse notes was held liable on notes indorsed by the agent, although the indorsement was made for the latter's benefit to enable him to obtain a loan. And to the same effect is *Hellmann* v. *Potter* (1856) 6 Cal. 13.

And there are *dicta* in *Morgan* v. *Johnson* (1912) — Ont. L. Rep. —, 4 D. L. R. 646, and *Prescott* v. *Hancox* (1913) — B. C. —, 13 D. L. R. 332, that where an agent is acting within the scope of his authority the principal is liable for his fraud even though it was committed for the agent's benefit.

In *Mackenzie* v. *Monarch Life Assur. Co.* (1911) 45 Can. S. C. 232, a company was held estopped as against a plaintiff who had agreed to the settlement of an action against the company in consideration of stock certificates signed by the authorized officers of the company, to set up that the shares were issued without authority, although one of the officers signing the certificates acted for his own interest.

In *Hayward Lumber Co.* v. *Cox* (1907) — Tex. Civ. App. —, 104 S. W. 403, which was an action against the principal to recover for goods sold by the plaintiff to the defendant through the latter's agent, it was held that if the seller did not know of or participate in the agent's intention to defraud his principal by charging more for the goods than their value, the agent's fraud would not avoid the sale.

J. T. W.

[HOUSE OF LORDS.]

LLOYD (Pauper), *Appellant*, and GRACE, SMITH, & COMPANY, *Respondents*.

[1912] A. C. 716.

Also Reported in 81 L. J. K. B. N. S. 1140, 107 L. T. N. S. 531, 28 Times L. R. 547, 56 Sol. Jo. 723.

Principal and agent — Authority — Liability of principal for fraud of agent.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

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Barwick v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, is not an authority for the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal.

Dicta of Lord Bowen, when Bowen, L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at p. 718, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at p. 465, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248, overruled.

A widow, who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages and to call in the mortgage money, and for that purpose to give him her deeds (for which he gave a receipt in the firm's name); and also to sign two documents, which were neither read over nor explained to her, and which she believed she had to sign in order to effect the sale of the cottages. These documents were in fact a conveyance to him of the cottages and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit:—

Held, that the firm were responsible for the fraud committed by their representative in the course of his employment.

Decision of the Court of Appeal [1911] 2 K. B. 489, 80 L. J. K. B. N. S. 959, 104 L. T. N. S. 789, 27 Times L. R. 409, 55 Sol. Jo. 461, reversed.

(July 19, 1912.)

Present: Earl Loreburn, Earl of Halsbury, Lord Macnaghten, Lord Atkinson, and Lord Shaw of Dunfermline.

APPEAL from an order of the Court of Appeal reversing a judgment of Scrutton, J. [1911] 2 K. B. 489, 80 L. J. K. B. N. S. 959, 104 L. T. N. S. 789, 27 Times L. R. 409, 55 Sol. Jo. 461.

The appellant, who was a widow, owned two freehold cottages at Ellesmere Port, which she had purchased in 1909 for 540*l.*, and a sum of 450*l.* advanced to one Rushworth on a mortgage of a house in Hartingdon Road, Liverpool.

The respondents were a firm of Liverpool solicitors of old standing [717] and high repute, but the business was in fact carried on by Frederick Smith (hereinafter referred to as the respondent) alone in the name of the firm.

The respondent's firm had acted as solicitors to the vendor on

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the sale of the Ellesmere Port property, and the appellant had become acquainted with the firm in the course of this transaction.

On January 11, 1910, the appellant, being dissatisfied with the income derived from this property, called at the office of the respondent's firm for the purpose of consulting them on the matter. At the office she saw one Sandles, who was the respondent's conveyancing manager and managing clerk. Sandles conducted the conveyancing work of the firm without supervision. He had authority to arrange and negotiate sales of real property and to carry them out, and also to receive deeds for safe custody. The respondent's time was largely taken up in attending to his public duties as an alderman of the city of Liverpool, and, in his absence, Sandles was left in charge of the office. Sandles was unknown to the appellant, who believed him to be a member of the respondent's firm. At this interview the appellant discussed with him both the Ellesmere Port property and the Liverpool mortgage. He said that she was not getting enough for her money, and asked her to call again and bring with her the deeds relating to the Ellesmere Port property and to the mortgage.

On January 12 the appellant again called at the respondent's office, bringing the deeds with her, and had another interview with Sandles. Acting on his advice she instructed him to sell the cottages and call in the mortgage money. The reinvestment of the money was then discussed, and Sandles suggested that the money should be invested in certain companies in which he was interested and which he told her would produce 10 per cent, but nothing was settled as to that. The appellant left her deeds with Sandles, who gave a receipt for them in his own name. In the course of this interview Sandles left the room, taking the deeds with him. After an interval of twenty minutes he returned with a clerk and produced two documents which he asked the appellant to sign. These documents were not read over to the appellant, and were not explained to her. She signed them without reading them, [718] believing that they were something she had to sign before the sale could be proceeded with. These documents were in fact a conveyance by the appellant to Sandles of the Ellesmere Port property at the price of 540*l.*, and a trans-

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fer by her to him of the mortgage on the Liverpool property in consideration of the sum of 450*l.*

On the following day, January 13, Sandles mortgaged the Ellesmere Port property to the Union Credit Bank to secure a loan to himself of 378*l.* and interest, expressed in the mortgage as 550*l.*, and he also gave notice to Rushworth of the transfer to him of the mortgage on the Liverpool property, and called in the mortgage money.

On January 14 the appellant, who had been advised by a friend that she ought to get a receipt for the deeds in the name of the firm, wrote to Sandles canceling her instructions to sell the cottages and to call in the mortgage.

On January 17 the appellant again saw Sandles at the office, and told him she had changed her mind as to the investment of her property and proposed to buy corporation stock. Sandles told her that that was not solicitors' work and she should consult a stockbroker. He also told her that he had already called in the mortgage money, and advised her to leave her deeds with him. Pointing to a pile of deed boxes in the office he said, "They will be quite safe with us." The appellant then told him not to proceed with the sale of the Ellesmere Port property, and asked for a receipt in the firm's name for her deeds. Sandles gave her a receipt for both sets of deeds, dated January 17, 1910, which he signed "Grace, Smith, & Co. C. W. S."

On March 12 Sandles wrote to the appellant, inclosing a cheque for interest on the Liverpool mortgage, which he said Rushworth had sent him, and stating that the mortgage would be paid off in April. Rushworth did not in fact pay off the mortgage, but on April 5 Sandles transferred the mortgage to one Littler and received from him 450*l.*, which he applied in paying a private debt of his own. On April 28 Sandles called on the appellant and told her that the mortgage money would be paid the following week, and he gave her a cheque of his own for 450*l.* dated May 3. This cheque was not presented, and it would not [719] have been honored. About the end of April the fraud by which Sandles had deprived the appellant of her property was discovered by the respondent. On May 2, at an interview which the appellant had with the respondent at his office, the respondent told her that he had required Sandles to repay the

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money which he owed the Union Credit Bank on the mortgage of the Ellesmere Port property, and that Sandles had promised to send him 450*l.* but had only sent 250*l.*, and he offered to lend her 200*l.* in order to recover the deeds from the bank. The appellant then went with the respondent to the bank, and the deeds were handed over to the respondent on payment of 450*l.*, which comprised the 250*l.* received from Sandles and 200*l.* lent by the respondent. The deeds were retained by the respondent.

No imputation was cast upon the honor of the respondent.

In these circumstances the appellant commenced an action against the respondent's firm for delivery up of the deeds of the Ellesmere Port property and for payment of the 450*l.* advanced on the Liverpool mortgage. The appellant, by her statement of claim, alleged that she instructed the respondents as her solicitors to sell her Ellesmere Port property and to call in the money advanced on the Liverpool mortgage; that for the purpose of enabling the respondents to effect the said sale and calling in she delivered to the respondents her deeds relating to those properties; that the respondents had not sold the Ellesmere Port property and had refused to return her deeds. She also alleged that the respondents had called in and received the 450*l.* lent on mortgage. The respondents by their defense denied that the appellant had ever instructed them as her solicitors, and they pleaded alternatively that the appellant had conveyed the Ellesmere Port property and transferred the mortgage to Sandles, and that they had paid off the mortgage granted by Sandles to the Union Credit Bank, and had become entitled to the said freehold property and to the possession of the deeds relating thereto; and that as to the mortgage money the appellant had ceased to have any interest in it when the mortgage was transferred by Sandles to Littler. The appellant in her reply denied having executed the indentures of conveyance and transfer to Sandles, and alleged alternatively that she was induced to execute the said indentures [**720**] by the fraud of Sandles acting in the course of his employment and within the scope of his authority as managing clerk of the respondents, and that he fraudulently stated to the appellant that her execution of the said indentures was necessary and usual to enable the respondents

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to sell the Ellesmere Port property and to call in the mortgage money.

The action was tried at Liverpool before Scrutton, J., and a special jury.

The learned judge left certain questions to the jury, which, together with their answers thereto, were as follows:

(1) In receiving the deeds and taking instructions to sell the property and call in the mortgage debt, did Sandles profess to act in his private capacity or as conveyancing manager to Grace, Smith, & Company?—He professed to act as conveyancing manager to Grace, Smith, & Company.

(2) If he professed to act as conveyancing manager to Grace, Smith, & Company, was he in reality acting on his own behalf and for his own benefit?—He acted in reality on his own behalf and for his own benefit.

(3) In receiving the deeds of the property and the mortgage, did he act (a) in the course of his business as conveyancing manager? —Yes. (b) For his master's benefit?—No.

(4) In taking a transfer of the Ellesmere Port property and pledging it, did he act (a) in the course of his services as managing clerk?—No. (b) For his master's benefit?—No.

(5) In taking a transfer of the mortgage to himself, did Sandles act (a) in the course of his business as managing clerk? —No. (b) For his master's benefit?—No.

(6) In calling in the mortgage debt and transferring it, did he act (a) in the course of his master's business?—Yes. (b) For his master's benefit?—No.

The jury added to their findings the following rider: "The jury are of opinion that throughout the whole history of the transaction Mrs. Lloyd believed she was dealing with Messrs. Grace, Smith, & Company."

It was agreed between the parties at the trial that any supplementary findings of fact which it became necessary to decide should be made by the judge. In accordance with this [721] agreement, Scrutton, J., found as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the appellant did rely on the representations of Sandles, professing to act on behalf of the

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firm, that the documents in question were necessary to facilitate and carry out the sale of the land to her; that she did not know she was signing conveyances to Sandles outside the scope of his authority, and that she was justified in relying on the representations of Sandles without reading and trying to understand the documents tendered to her, but that she knew she was signing something affecting her estate.

On these facts Scrutton, J., gave judgment for the appellant for the return of the deeds of the Ellesmere Port property and for the sum of 450*l.* in respect of the claim relating to the mortgage. In the opinion of the learned judge, where a servant acted within his apparent authority, but for his own benefit, the master was liable for his acts, whether in contract or tort. As he read the rule of law laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at p. 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, it did not mean that, in order to make the master liable, it was essential that the servant, though acting in the apparent course of his employment, should act for his master's benefit, and he dissented from the *dictum* of Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at pp. 445, 446, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248. With regard to the answer of the jury to question 6 (a), he held that there was no evidence to support it, and he accordingly disregarded that answer.

The Court of Appeal (Farwell and Kennedy, L.JJ., Vaughan Williams, L.J., dissenting) reversed this decision and ordered that judgment should be entered for the defendants (the respondents).

Tobin, K.C., and **J. A. Johnston**, for the appellant. The principal is liable, whether the action be founded on contract or tort, for the act of his agent done within the scope of his authority, and whether the act be careful or negligent, honest or fraudulent.

This is established as regards contracts by *Bryant, Powis &* [722] *Bryant, Ld.* v. *Quebec Bank* [1893] A. C. 170, 62 L.

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J. P. C. N. S. 68, 1 Reports, 336, 68 L. T. N. S. 546, 41 Week. Rep. 600, and *Hambro* v. *Burnand* [1904] 2 K. B. 10, ante, 480, 73 L. J. K. B. N. S. 669, 52 Week. Rep. 583, 90 L. T. N. S. 803, 20 Times L. R. 398, 9 Com. Cas. 251, and as regards torts by *Thompson* v. *Bell* (1854) 10 Exch. 10, 23 L. J. Exch. N. S. 321, 2 C. L. R. 1213, 2 Week. Rep. 559; *Swire* v. *Francis* (1877) 3 App. Cas. 106, 47 L. J. P. C. N. S. 18, 37 L. T. N. S. 554, and *Trott* v. *National Discount Co.* (1900) 17 Times L. R. 37. Bowstead on Agency, 4th ed., p. 264, art. 80, sums up the appellant's argument. Willes, J., in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at p. 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, does not say that a principal will not be liable for an act done by his agent within the scope of his authority, unless the act is done for the benefit of his principal. The sole question is whether the act is within the scope of the agent's authority. The appellant's deeds having got lawfully into the possession of the solicitors, the fraud of their agent in stealing them is no answer to the action. Further, the documents which the appellant was induced to sign, not knowing what they were, are not her deeds.

Greer, K.C., and **Cuthbert Smith**, for the respondents. This is a claim for the return of goods bailed and alternatively for false representation. As regards the first claim, where goods are deposited with a person for safe custody, he is not liable if his servant afterwards converts the goods to his own use. *Cheshire* v. *Bailey* [1905] 1 K. B. 237, 74 L. J. K. B. N. S. 176, 53 Week. Rep. 322, 92 L. T. N. S. 142, 21 Times L. R. 130; *Jobson* v. *Palmer* [1893] 1 Ch. 71, 62 L. J. Ch. N. S. 180, 3 Reports, 173, 67 L. T. N. S. 797, 41 Week. Rep. 264; *Giblin* v. *McMullen* (1868) L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445, 3 Eng. Rul. Cas. 613. There is no authority for the proposition that a solicitor receiving the deeds of a client for safe custody is under any greater liability than a banker, who in the last cited case was held to be not responsible. His only duty is that of an ordinary bailee. As regards the second claim, where a tort—whether it be false representation, tres-

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pass, conversion, or any other wrongful act—is committed by a servant, the master is not responsible if the object in committing the tort is the servant's own benefit, and not the benefit of the master. *Barwick* v. *English Joint Stock Bank, supra; British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150; *Thorne* v. *Heard* [1894] 1 Ch. 599, at p. 615, affirmed [1895] A. C. 495, 64 L. J. Ch. N. S. 652, 11 Reports, 254, 73 L. T. N. S. 291, 44 Week. Rep. 155; *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at pp. 445, 446, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248; *Sanderson* v. *Collins* [1904] 1 K. B. 628, at p. 632, 73 L. J. K. B. N. S. 358, 52 Week. Rep. 354, 90 L. T. N. S. 243, 20 Times L. R. 249.

[723] [**The Earl of Halsbury** referred to *Limpus* v. *London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258.]

Where an agent has authority to contract and the contract is made, the motive of the agent in making the contract is immaterial, and the principal is liable, for the reasons stated by Mathew, L.J., in *Hambro* v. *Burnand* [1904] 2 K. B. 10, at p. 25, ante, 480, 73 L. J. K. B. N. S. 669, 52 Week. Rep. 583, 90 L. T. N. S. 803, 20 Times L. R. 398, 9 Com. Cas. 251, but that is not so in the case of a tort, and the moment that an agent commits a voluntary wrongful act for his own benefit he ceases to be acting within the scope of his authority.

Further, this was not solicitors' business. The terms proposed by Sandles as to reinvestment were Sandles' business, and the property was to be sold and the mortgage money called in merely to enable Sandles to put the money into his own companies. Up to the point when Sandles gave the receipt for the deeds in the firm's name, he had done nothing to induce the appellant to believe that he was acting on behalf of the respondents. So long as findings 4 and 5 stand, judgment cannot be entered for the appellant.

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J. A. Johnston in reply. The rule laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at p. 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, has been misunderstood by Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at p. 445, 76 L. J. Ch. N. S. 843, 98 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248, and his *dictum* was not necessary for the decision of the case, because the act there was clearly not within the scope of the agent's authority. The same remark applies to the *dictum* of Bowen, L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at p. 718, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150. There is no foundation for the distinction between contract and tort for this purpose. The principle of the liability is agency, and if the act done is within the scope of the agent's authority the nature of the act is immaterial. [He also referred to *Rhodes* v. *Moules* [1895] 1 Ch. 236, 64 L. J. Ch. N. S. 122, 12 Reports, 6, 71 L. T. N. S. 599, 43 Week. Rep. 99.

The House took time for consideration.

Earl Loreburn, L.C., moved that the order appealed from be reversed and the judgment of Scrutton, J., [**724**] restored, and intimated that the reasons for their Lordships' decision would be given at a later date when all the members of the House who were present at the hearing of the argument would be able to attend and express their opinions.

Their Lordships now gave their reasons for this decision.

Earl Loreburn: My Lords, the facts of this case, except in immaterial points, are quite clear and undisputed.

The appellant, Mrs. Lloyd, had bought some property, and thus had come to know of the defendant, a solicitor. She had doubts about having got her money's worth, and went to the defendant's office to inquire. When there she saw one Sandles, the defendant's managing clerk, and was induced by him to give

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him instructions to sell or realize this property, and for that purpose to give him the deeds and to sign two documents which she neither read nor knew the tenor of, but which put into Sandles' possession her interest therein. She gave him the deeds as the defendant's representative. Having got them and the signed documents, he dishonestly disposed of this lady's property and pocketed the proceeds. That is the whole story as it is now either found or admitted because it was incontestable.

It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorized to receive deeds and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm,—and she so treated him throughout,—to realize her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and intrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which [**725**] he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.

At the hearing the learned judge, no doubt with a view to avoid the risk of a new trial in so small a case, appears to have been prevailed upon to put no less than six questions, with subdivisions making in all ten questions, to the jury. Some of them were quite immaterial. Others were framed in order to raise a point of law supposed to be affirmed by Willes, J., in the case of *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at p. 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, in a passage which admitted of more than one meaning. The meaning of the answers depends upon how the jury understood the questions, and we were not told how they were explained to the jury. That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it

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in the sense in which Willes, J., means the word "benefit," is not true upon the admitted facts. Willes, J., cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that.

I have only to say, as to the authority of *Barwick* v. *English Joint Stock Bank, supra,* that I entirely agree in the opinion about to be delivered by Lord Macnaghten. If the agent commits the fraud, purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Willes, J., be looked at, instead of one sentence alone, he does not say otherwise.

Earl of Halsbury: My Lords, I, in common, I believe, with all your Lordships, think that this appeal must be allowed and that judgment must be entered for the plaintiff, and but for what appears to me a singular misapprehension I should not have thought it necessary to add anything to Scrutton, J.'s, very careful and very accurate judgment; but I think the judgment in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, in the Exchequer Chamber, has been misunderstood, and as it is certainly a [**726**] judgment of very high authority, it is desirable to examine it carefully and to see what it really did decide.

It was a decision of the Exchequer Chamber delivered by Willes, J., the court consisting of Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ., as well as the learned judge who probably, though not certainly, wrote the judgment, and with whom all the judges concurred,—a judgment, therefore, of the very highest authority, and one which I think it would be impossible to suppose we are saying anything to shake.

The actual decision of the court was that Martin, B., was wrong in nonsuiting the plaintiff and there must be a new trial, and I think one source of the misapprehension to which I have referred is the care with which the learned judges avoided deciding or assuming how the question was to be decided by the jury in the trial which was then ordered.

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So far from giving any authority for the proposition in favor of which it is quoted, the court went out of its way to disclaim there being any doubt about the rule that the principal is answerable for the act of his agent in the course of his master's business, and the words added, "and for his benefit," obviously mean that it is something in the master's business; and the judgment in question says that that question was settled as early as Lord Holt's time, a tolerably strong indication that the judges thought there was not much doubt about what the law is now.

Sir John Holt, the authority who for more than twenty years presided over the Court of King's Bench with the confidence of all parties at a somewhat stormy point of our history, and who has been described as a perfect master of the common law, speaks in the case cited by Willes, J. (*Hern* v. *Nichols* (Undated, *c.* 1700) 1 Salk. 289), with no uncertain voice upon the subject, confirmed and adopted by such a court as I have described after more than two centuries. The case was this: An action on the case for deceit was brought by one Hern against a merchant named Nichols. The reporter seems to have had some difficulty in making out what the particular kind of silk in question was, for he has left its description blank; but enough of the pleadings is given to indicate very clearly what the complaint was, and in effect, it was alleged [**727**] that one kind of silk was represented to be sold as such, and another and an inferior sort of silk was supplied.

Upon trial, says the report, not guilty pleaded, it appeared there was no actual deceit by the defendant, but it was his factor beyond sea, and the doubt was whether this should charge the merchant; and Holt, C.J., was of opinion that the merchant was accountable for the deceit of his factor, though not *criminaliter,* yet *civiliter,* "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

I should be very sorry to see a principle which appears to me of so great value shaken by any authority. No treatise on agency that I have ever come across has thrown any doubt on it, and it would be strange indeed if it should be shaken by the decision in *Barwick* v. *English Joint Stock Bank, supra,* since that case

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appears to me a strong authority confirming and strengthening the accuracy of the principle.

Lord Macnaghten: My Lords, in the office of Grace, Smith, & Company, a firm of solicitors in Liverpool of long standing and good repute, the appellant, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property. It was not much, just a mortgage for 450*l.* bequeathed to her by her late husband, and two freehold cottages at Ellesmere Port, which she bought herself without legal assistance for 540*l.*, after her husband's death. But it was all she had; and after the order of the Court of Appeal reversing a decision in her favor pronounced by Scrutton, J., who tried the case with a special jury, she was compelled to appeal to this House as a pauper.

At the date of the transaction which gave rise to this litigation, Mr. Frederick Smith was the sole member of the firm of Grace, Smith, & Company. He was a gentleman "devoted," as he says, "to public work," meaning by that, I suppose, that his proper business as a solicitor was a matter of secondary consideration with him. There is no imputation or reflection on [**728**] the honor of the firm or on the honesty or honor of Mr. Frederick Smith. The fraud of which Mrs. Lloyd complained was committed by his accredited representative, a clerk in the office, one Sandles, in the course of the business which Mrs. Lloyd had put into the hands of the firm, and which was undoubtedly a solicitor's legitimate business.

Mrs. Lloyd thought Sandles was a member of the firm. He was really conveyancing manager and managing clerk. He conducted the conveyancing business of the firm without supervision. Mr. Smith admits that Sandles was "practically second in command." But in his own department he was in supreme command. He represented the firm to all intents and purposes just as much as if he had been a partner. Mr. Smith says that he never gave away his own authority. In proof of this statement or in connection with it Mr. Smith adds, "I was supposed to be told by Sandles." What he was told or supposed to be told does not appear from the learned judge's notes.

The fraud was committed in January, 1910. It was not discovered until the following April, when Mr. Smith dismissed

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Sandles for some irregularity, and Mrs. Lloyd's deeds, for which she held a receipt in the name of the firm, were not to be found.

The story of the fraud is this: On January 11, 1910, Mrs. Lloyd called at the office of Grace, Smith, & Company. It was her second visit on the business about which she wanted the firm's advice. She had called in the preceding November to make some inquiries about her property. And once before that, when the purchase of the Ellesmere Port cottages was completed, she had been to the office to get her deeds from Grace, Smith, & Company, who were the vendor's solicitors. That was all she knew of the firm. On January 11, 1910, she saw Sandles. She was dissatisfied with the return she got from her property. Sandles advised her to call in the mortgage and to sell the Ellesmere Port property. He asked her to come the next day and bring her deeds with her. On the 12th she brought her deeds, and gave the instructions which Sandles had suggested. After some conversation Sandles left the room, taking the deeds with him. He returned in about twenty minutes with one of the clerks, and put before her two [**729**] documents, which he told her to sign. He did not tell her what they were. She did not read them. She signed both without demur or question, believing them, she says, to be something she "had to sign before the houses were sold." It turned out that one was a transfer of the mortgage to Sandles himself, expressed to be in consideration of 450*l.* paid to Mrs. Lloyd. The other was an absolute conveyance to Sandles of the Ellesmere Port property with a receipt for purchase money in the body of the deed. At the same time he gave her a receipt for her deeds in his own name. She showed the receipt to a friend, who said it was in an odd form, and that she ought to have a receipt in the name of the firm. On the 14th she wrote to say she had changed her mind and wished to cancel her instructions. She went back to the office on the 17th, and asked for a receipt for her deeds in the name of the firm. Sandles gave her at once the receipt she asked for.

Armed with the two deeds, executed by Mrs. Lloyd and witnessed by one of the clerks of the firm, Sandles promptly called in the mortgage, transferred it, and disposed of the proceeds in payment of a debt of his own. The conveyance of the Elles-

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mere Port property he pledged with a bank to which he was indebted.

At the trial the learned judge put a series of questions to the jury. In answer to the first question the jury stated that, "in receiving the deeds and taking instructions to sell the property and call in the mortgage debt, Sandles professed to act as conveyancing manager to Messrs. Grace, Smith, & Company." The other questions were framed to meet a view of the meaning and effect of the well-known decision in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, which no doubt has obtained currency of late, but which, I think, is erroneous. The answers to these questions are not of much assistance in deciding the real question at issue. Then the jury added a rider that they were of opinion that "throughout the whole history of the transaction Mrs. Lloyd believed she was dealing with Messrs. Grace, Smith, & Company."

It was agreed by the parties that any supplementary finding of fact which it became necessary to decide should be made by [730] the learned judge. Under that agreement the learned judge, as he says, "found as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the client did rely on the representations of Sandles, professing to act on behalf of the firm, that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representation of Sandles without reading and trying to understand the documents tendered to her." That seems to me to be a clear finding that the fraud was committed in the course of Sandles' employment, and not beyond the scope of his agency.

The learned judge thereupon, after consideration, gave judgment for the plaintiff. His decision was reversed by the Court of Appeal (Vaughan Williams, L.J., dissenting).

The first line of defense set up by Mr. Smith was that Mrs. Lloyd was not a client of the firm at all, but a personal friend of Sandles, and that the transaction was a private deal between

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Mrs. Lloyd and Sandles. It is enough to say that there is no foundation for this defense. It was negatived by the jury in their answer to the first question and in the rider which they added to their special verdict. Sandles, no doubt, was playing a double game. To Mrs. Lloyd he was Grace, Smith, & Company; to the clerks in the office Mrs. Lloyd's visits were the private visits of a personal friend.

The other line of defense, which found favor with the Court of Appeal, requires more consideration. It was rested on the fact that the fraud was committed, not for the benefit of the firm, but for the benefit of Sandles himself. It was contended that *Barwick's Case* is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal.

Barwick v. *English Joint Stock Bank, supra,* is no doubt a case of the highest authority. It was decided in the Exchequer Chamber, and the judgment was delivered by Willes, J. But I agree with [**731**] my noble and learned friend Lord Halsbury that the case has been misunderstood in late years, and that it does not decide any such proposition as that for which it was cited in the Court of Appeal. It decided two things. It decided that the learned trial judge was wrong in nonsuiting the plaintiff. It also decided that if on a new trial the jury should come to the conclusion that the agent of the bank had in fact committed the fraud, which in the pleadings was charged as the fraud of the bank, then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded. And I think it follows from the decision, and the ground on which it is based, that in the opinion of the court a principal must be liable for the fraud of his agent committed in the course of his agent's employment, and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

Now it must be remembered that in 1867, when *Barwick's Case* was decided, there was some difference of judicial opinion on the question whether an innocent principal was liable for the fraud of his agent, even when he had received the benefit of the fraud. In *Barwick's Case* the agent committed the alleged fraud, if he did commit it, for the benefit of his principals. It

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may be that he was indirectly acting for his own benefit. He may have wished to recommend himself to his principals, by astuteness and zeal in their service, or he may have intended to make amends for over-confidence in an impecunious customer; but the direct pecuniary benefit was the benefit of the principals. It must also be remembered that in the then recent case of *Udell* v. *Atherton* (1861) 7 Hurlst. & N. 172, 30 L. J. Exch. N. S. 337, 7 Jur. N. S. 777, 4 L. T. N. S. 797, by an equal division of the members of the court, an innocent principal succeeded in retaining the benefit of a fraud committed by his agent. Possibly that case in some measure turned, as *Cornfoot* v. *Fowke* (1840) 6 Mees. & W. 358, 9 L. J. Exch. N. S. 297, 4 Jur. 919, is said to have turned, on a question of pleading, but certainly one learned judge who was in favor of the defendant, though he held strongly that an innocent principal was not liable in an action of deceit for the fraud of his agent, even though he had profited by it, expressed an opinion that there was no form of action in which liability [732] for vicarious fraud could be established against an innocent principal.

It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes, J., expressed himself in the language which has been misunderstood. What Willes, J., said was this: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." To that statement of the law no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. Willes, J., does not, I think, say anything of the kind. In a sentence immediately preceding the sentence I have quoted, he observes that the question whether the principal is answerable for the act of an agent was settled as early as Lord Holt's time,—a general observation not confined to the case where the principal is a gainer by the fraud.

The question as to the meaning and effect of the ruling of

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Willes, J., may, I think, be best ascertained by reference to a few cases in which some of the learned judges who took part in the decision in *Barwick's Case* delivered opinions.

Of the judges who were concerned in *Barwick's Case,* none were more eminent than Montague Smith, J., and Blackburn, J. They were second only—if they were second—to Willes, J., himself. And their views at least are on record.

The first important case in which the ruling in *Barwick's Case* was discussed was the case of *Mackay* v. *Commercial Bank of New Brunswick* (1874) L. R. 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473. In that case the Judicial Committee reaffirmed the ruling of Willes, J. There the fraud was committed for the benefit of the principal. But it was argued by Mr. Benjamin, Q.C., that the appellants in the Privy Council would be entitled to retain the verdict if they had sustained damage from the fraudulent representation of an agent, made [**733**] within the scope of his authority, even though the principal had not profited thereby. The judgment was delivered by Sir Montague Smith. He observed (L. R. 5 P. C. at p. 410) that their Lordships regarded it as "settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority." He discussed at some length what meaning was to be attached to the expression "the scope of the agent's authority." "There are," says Sir Montague Smith, "some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine . . . it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of, or gave a general authority to commit frauds: at the same time, it is not easy to define with precision

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the extent to which this liability has been carried." Then Sir Montague Smith says, "The best definition of it . . . is to be found in the case of *Barwick* v. *English Joint Stock Bank,*" (1867) L. R. 2 Exch. 259, 12 Eng. Rul. Cas. 298, and he quotes the words of Willes, J., who, after enumerating instances where the principle had been applied, proceeded as follows: "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

At the conclusion of the judgment, in reference to Mr. Benjamin's argument, his Lordship expresses himself as [**734**] follows (L. R. 5 P. C. at p. 416): "It is not necessary to determine whether or not the plaintiffs could have retained their verdict if they had proved only that they had sustained damage from the fraudulent representation of an agent of the defendants made within the scope of his authority, without proof of the defendants having profited thereby."

It is difficult to imagine that Sir Montague Smith would have expressed himself in this manner if he had supposed that the question which he reserves had been already determined in the case of *Barwick* v. *English Joint Stock Bank, supra.*

Mackay v. *Commercial Bank of New Brunswick, supra,* was decided in 1874; it was followed in 1877 by *Swire* v. *Francis,* 3 App. Cas. 106, 47 L. J. P. C. N. S. 18, 37 L. T. N. S. 554, a case also in the Privy Council. That was a case in which the principal was held liable for the fraud of his agent, though it was committed for the benefit of the agent himself, and not for the benefit of the principal. The judgment was delivered by Sir Robert Collier, but Sir Montague Smith was a party to the judgment.

The only other case with which I will venture to trouble your Lordships is the case of *Houldsworth* v. *City of Glasgow Bank,* 5 App. Cas. 317, 42 L. T. N. S. 194, 28 Week. Rep. 677, decided in 1880. In that case *Barwick* v. *English Joint Stock Bank; Mackay* v. *Commercial Bank of New Brunswick;* and *Swire* v. *Francis, supra,* are referred to at some length, both by

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Lord Selborne and by Lord Blackburn. Lord Selborne observes, as has been observed in other cases, that the principle on which those cases were decided was a principle not of the law of torts, or of fraud or deceit, but of the law of agency. "The decisions in all these cases proceeded," he said, "not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's Case*) 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.' "

Here I must ask your Lordships' particular attention to the [**735**] fact that in the passage which Lord Selborne quotes from the judgment of Willes, J., as explaining the true ground of decision in *Swire* v. *Francis, supra,* as well as in *Barwick's Case* and in *Mackay* v. *Commercial Bank of New Brunswick, supra,* the words, "and for his master's benefit," are omitted. In the original they follow the words, "in the course of his master's business." Unfortunately in the report in 5 Appeal Cases, though the passage is printed as a quotation with inverted commas, the omission is not denoted in the usual way by asterisks. And it seems to have escaped observation. But it is most significant. No one who calls to mind Lord Selborne's extreme accuracy in such matters can doubt that the omission was intentional. If the words omitted had been left standing, the passage would not have been applicable to *Swire* v. *Francis.* In *Barwick's Case* the words are appropriate. In a general statement of the law they are out of place. That this was Lord Selborne's own opinion is evident. On the words as occurring in *Barwick's Case* Lord Selborne makes no comment. When he comes across the same expression in Lord Cranworth's judgment in *Addie's Case* (1867) L. R. 1 H. L. Sc. App. Cas. 145, he gives a note of warning. There it is made part of a general proposition. And Lord Selborne says that the words "may perhaps require some enlargement or explanation." That is quite enough to show that Lord Selborne was not prepared to accept them as an integral part of the proposition which he considered the true ground of decision in *Barwick's Case* and the two cases which followed it, without some qualification.

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Lord Blackburn's view of the judgment in *Barwick's Case* requires no explanation. It is clear enough. After referring to *Barwick's Case* he expresses himself as follows (5 App. Cas. at p. 339): "I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question;" and then come these important words: "The substantial point decided was, as I think, that an [736] innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud."

That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions, "acting within his authority," "acting in the course of his employment," and the expression, "acting within the scope of his agency" (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used, it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes, J., is the best that can be given.

In the case of *Udell* v. *Atherton* (1861) 7 Hurlst. & N. 172, at p. 180, Wilde, B., afterwards Lord Penzance, in his admirable judgment, makes the following observation: "It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this, as a general proposition, I agree. *All* deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal." In the same case, in a passage which was approved apparently by the court in *Mackay* v. *Commercial Bank of New Brunswick* (1874) L. R. 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473, Martin, B. (7 Hurlst. & N. at p. 198), stated the question to be, "Was his" (the agent's) "situation such as to bring the representation

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he made within the scope of his authority?" In those passages the true principle is, I think, to be found.

The principle as stated by Lord Blackburn is in accordance with the opinion expressed by Story, J. I venture to quote Story's opinion, not only because it is the considered opinion of a most distinguished lawyer, but also because it is cited apparently with approval in the Court of Queen's Bench, consisting of [737] Cockburn, C.J., Blackburn, Mellor, and Lush, JJ., by Blackburn, J., himself in a case which occurred in the interval between the date of *Barwick's Case* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, and the decision in *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317, 42 L. T. N. S. 194, 28 Week. Rep. 677. The passage in the judgment of Blackburn, J., as reported in *McGowan & Co.* v. *Dyer* (1873) L. R. 8 Q. B. 141, at p. 145, is as follows: "In Story on Agency, the learned author states, in § 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment,* although the principal did not authorize or justify, or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them.' He then proceeds, in § 456: 'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.'"

I may observe in passing that, although Lord Bramwell held strongly the view that for the fraud of an agent committed for the principal's benefit, the principal is not answerable, either in an action of deceit or in any other form of action, yet he seems to think that it follows (as indeed it must follow logically) that if liable in that case the principal must be liable in all cases. For he suggests in *Weir* v. *Bell* (1878) 3 Ex. D. 238, at p. 245, 47 L. J. Exch. N. S. 704, 38 L. T. N. S. 929, 26 Week. Rep.

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746, that, instead of imputing vicarious fraud to the principal, such cases as *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, might be decided on the ground that "every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract."

With the most profound respect for Lord Bowen and Lord Davey, I cannot think that the opinions expressed by Lord Bowen [738] in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at p. 718, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, and by Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at p. 445, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248, in reference to the question under discussion, can be supported either on principle or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both.

The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

So much for the case as it stands upon the authorities. But putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr. Smith were not held liable for the fraud of his agent in the present case. When Mrs. Lloyd put herself in the hands of the firm, how was she to know what the exact position of Sandles was? Mr. Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room, and tells her that her deeds are quite safe in

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"our" hands. Naturally enough she signs the documents he puts before her without trying to understand what they were. Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith, who put this rogue in his own place and clothed him with his own authority? If Sandles had been a partner in fact, Mr. Smith would have been liable for the fraud of Sandles as his agent. It is a hardship to be liable for the fraud of your partner. But that is the law under the partnership act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guaranty of his honesty; but there are such things as fidelity policies. You can insure the honesty of the person you employ in a confidential situation, [**739**] or you can make your confidential agent obtain a fidelity policy.

With all respect to the learned judges of the Court of Appeal, I think the decision appealed from is wrong. I think they are in error as regards the law, and I think they have not taken the correct view of the facts. They look at the execution of the deeds by which Sandles cheated Mrs. Lloyd out of her property as if it were an isolated transaction,—as a thing standing by itself; whereas the trick was so cunningly contrived as to seem to the victim of the fraud a mere matter of course,—a trifling incident in the business about which the firm was being employed.

In the result I am of opinion that Mr. Frederick Smith was clearly liable for the fraud of his agent.

Lord Atkinson: My Lords, I have had the pleasure and advantage of reading the elaborate and exhaustive judgment which has just been delivered by my noble and learned friend Lord Macnaghten. I concur in every sentence in it, and it so fully expresses the views I entertain on the points in controversy in the case that I think it entirely unnecessary to read the judgment I had myself prepared. I would only add that I hope the decision of your Lordships' House in this case may be the means of correcting the misconception which has for some time prevailed as to the true ground upon which, and the limits within which, a principal may be held responsible for the frauds of his agent.

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Lord Shaw of Dunfermline: My Lords, the defendants, against whom personally no suggestion of a dishonoring kind is made, plead that they are not responsible in law for the conduct of their servant Sandles, which was nefarious, and that in the transactions in question in this case Sandles acted for his own benefit. Lord Macnaghten has in the opinion just delivered narrated the material facts in the suit, and it is quite unnecessary to resume them. With that opinion I entirely agree.

The case is in one respect the not infrequent one of a situation in which each of two parties has been betrayed or injured by the [**740**] fraudulent conduct of a third. I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud. Nor do I think it doubtful that it would be quite unsound in law if this result could be avoided by an investigation of the private motives—in the direction of his own, as distinguished from his master's, benefit—which animated an agent in entering into a particular transaction within the scope of his employment. The bulk of mercantile dealings are not direct, but are conducted through agents vested with an ostensible authority to act for their employers. When the authority is of a limited kind, the person transacting with such an agent is bound to assure himself that the limits are not exceeded,—a familiar instance of which is the case of bills signed per procuration. But when the authority does ostensibly include within its scope transactions of a particular character, then *quoad* a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority, and binds the principal.

It is not difficult to discover the legal source of much of the language employed in this case and appearing even in the questions put to the jury. It sprang from two sentences in the judgment of Willes, J., in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 12 Eng. Rul. Cas. 298, a case in which it is too often forgotten that the bank was in the position of having had and received, and of maintaining its right to

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retain, money paid to it in consequence of a misrepresentation by its agent. For the purposes of the present question the outstanding fact is the very one which is apt to be forgotten; namely, that the misrepresentation was made, and was admitted to have been made, in the interests of the bank as well as by its agent. These two things were conjoined in fact. This being so, in the course of his judgment, Willes, J., used the words: "But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and [741] for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The learned judge was not in this language setting up the necessity for a conjunction of these two things, but was dealing with a case in which admittedly the conjunction had occurred. I am aware of the approval given to this language in subsequent cases, as for instance in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at p. 445, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248, by Lord Davey, and in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at p. 718, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, by Lord Bowen. If I may respectfully do so, I tender my entire concurrence in the opinion just delivered by my noble and learned friend Lord Macnaghten upon the *dicta* of Lords Davey and Bowen in these cases. But I do so subject to this,—that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That, in my opinion, is not the law. On the contrary, the principal is, in such circumstances, legally responsible for his agent's conduct.

I incline to the view that in most, if not all, of the cases cited

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in argument, it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment. It was so in the instances cited. And a late and clear instance of this (much founded on at your Lordships' Bar) is *Cheshire* v. *Bailey* [1905] 1 K. B. 237, 74 L. J. K. B. N. S. 176, 53 Week. Rep. 322, 92 L. T. N. S. 142, 21 Times L. R. 130, 1 Ann. Cas. 94.

I refer to the analysis of the decisions in the judgment of Scrutton, J., and I add a reference to a somewhat similar analysis in the case of *Hambro* v. *Burnand* [1904] 2 K. B. 10, ante, 480, 73 L. J. K. B. N. S. 669, 52 Week. Rep. 583, 90 L. T. N. S. 803, 20 Times L. R. 398, 9 Com. Cas. 251, by the late Lord Collins, [**742**] then Master of the Rolls. I respectfully give my adhesion, without a further statement on my own part, to the views expressed in these judgments.

In the present case, as I have stated, it has been clearly found that the fraud was committed in the course of, and within the scope of, the duties with which the defendants had intrusted Sandles as their managing clerk. In my opinion, they must in these circumstances stand answerable in law for their agent's misconduct.

I think that the appeal should be allowed and that the action should be disposed of in the same sense as in the judgment of Scrutton, J., whose treatment, I desire to add, of the whole case, both in law and in fact, appears to me to have been correct, and with whose opinion I also respectfully agree.

Order of the Court of Appeal reversed and judgment of Scrutton, J., restored. Respondents to pay the costs in the courts below and also the costs of the appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues *in forma pauperis*.

Lords' Journals, March 28, 1912.

Solicitor for appellant: *Walter C. Broadbridge.*

Solicitor for respondents: *George Thatcher.*

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Note.—Liability of principal for fraud perpetrated by agent acting within apparent scope of his authority, but for his own benefit.

The scope of this note is parallel to that of the note accompanying *Hambro* v. *Burnand,* ante, 480, in that the present note deals with the principal's liability otherwise than on the contract attempted to be entered into, while that note is confined to the liability of the principal on the contract itself. It should be noted that it does not include cases where the agent's act was beyond his apparent authority, and is confined to instances where the act was done for the agent's own interest.

While there are *dicta* in *British Mut. Bkg. Co.* v. *Charnwood Forest R. Co.* (1887) 18 Q. B. D. 714, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150; *Ruben* v. *Great Fingall* [1906] A. C. 439, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248, and *Malcolm* v. *Waterhouse* (1908) 24 Times L. R. 854, to the effect that a principal is not liable for the agent's fraud where his act is done for his own interest, these are, in view of the decision in LLOYD v. GRACE, now unimportant, since that case determines the law of England to be otherwise.

The rule now appears to be generally recognized that, notwithstanding the fact that the agent's act was done for his own benefit, the principal is liable if the act was within the apparent scope of the employment.

Thus in *New York, N. H. & H. R. Co.* v. *Schuyler* (1856) 34 N. Y. 30, where a transfer agent had general authority to issue certificates of corporate stock, and, for his own purposes, fraudulently issued spurious certificates, the principal was held bound to indemnify honest purchasers of such stock. The court said: "In truth, the power conferred in these cases is of such a nature that the agent cannot do an act appearing to be within its scope and authority, without, as a part of the act itself, representing, expressly or by necessary implication, that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestæ* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer,

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you intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may, he takes because he gives the confidence and credit which enables its falsity to prove injurious to an innocent party." And, continuing, the court declared the law to be: "That where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

And to the same effect is *Titus* v. *Great Western Turnp. Road* (1874) 61 N. Y. 237.

And in *Trott* v. *National Discount Co.* (1900) 17 Times L. R. 37, a principal which undertook to effect investments was held liable to refund money received by one of its clerks from an intending investor, which the clerk appropriated to his own use, where he was held out as having authority to receive the money and intended from the beginning to misappropriate it.

And in *Rex* v. *Canadian P. R. Co.* (1913) — Can. Exch. —, 11 D. L. R. 681, a principal was held liable to the Crown for duties on goods which had not been paid by reason of the agent's fraud, where it appeared that he was appointed by the principal for customs purposes, and fraudulently dealt with and mislead the custom officials so that the proper duties were not paid, and that he had appropriated to his own use the refunds made on checks drawn by the principal for the payment of duties.

In *Birkett* v. *Postal Teleg. Cable Co.* (1905) 107 App. Div. 115, 94 N. Y. Supp. 918, affirmed in 186 N. Y. 591, 79 N. E. 1101, where the manager of a telegraph company who had general superintendence of its office in a town systematically overcharged a customer to whom monthly statements were furnished, and remitted only the proper sums to the telegraph company, the latter was held liable to the customer for the excessive charges paid; since the act was

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within the general line of the agent's authority, and the principal, and not the innocent third party, should suffer the loss.

And a telegraph company is liable to a customer for sums paid a messenger on account of memoranda which the latter had forged on slips presented by him for payment, it appearing that he was authorized to collect the company's accounts, and the slips being presented in the same manner as had been customary for a considerable period. *Wilmerding* v. *Postal Teleg. Cable Co.* (1907) 118 App. Div. 685, 103 N. Y. Supp. 594, affirmed without opinion in 192 N. Y. 580, 85 N. E. 1118.

In *Phipps* v. *Mallory Commission Co.* (1903) 105 Mo. App. 67, 78 S. W. 1097, where the defendants advised the plaintiffs, who desired to buy live stock, that they could do better if they would buy through the defendants' agent in another state, and the agent referred to fraudulently represented to the plaintiff that certain cattle belonged to another person, and were the best and cheapest that could be bought, when he had previously purchased them himself at a less price than that asked the plaintiff, and agreed with the person represented to be the owner that he was not to be known in the deal with the plaintiff, it was held that the latter, who purchased and paid for the cattle, was entitled, upon subsequently discovering the fraud, to recover from the defendants for the damage sustained on account thereof.

In *Washington County State Bank* v. *Central Bank & T. Co.* (1914) — Tex. Civ. App. —, 168 S. W. 456, it was held that a bank was liable for the acts of its president and cashier in selling a note supposed to be for the principal sum of $7,500, but which in fact was for $75 only, whether the bank in fact owned or had any interest in the note in question, where the purchaser supposed that he was dealing with the bank through its officers, and there was nothing in connection with the note to indicate to the purchaser that the bank was not its owner, and the draft given in payment for the paper purchased was made payable to the bank, which collected it, though the proceeds were wrongfully placed to the president's individual account.

In *Mick* v. *Corporation of Royal Exch. Assurance* (1914) — N. J. —, 52 L.R.A.(N.S.) 1074, 91 Atl. 102, it was held that a principal is liable for the fraud of his agent acting within the scope of his authority, whether or not the principal benefited by the success of the fraud. J. T. W.

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[ENGLISH DIVISIONAL COURT.]

IN RE PRICE.

PRICE *v.* NEWTON.

[1905] 2 Ch. 55.
Also Reported in 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44.

Will — Construction — "Ready money" — "Pecuniary investments" — Banker's deposit note.

Money on deposit with a testator's bankers, and subject to more than twenty-four hours' notice of withdrawal, will not pass under a bequest of "ready money," nor, in the absence of special indication, under a bequest of "pecuniary investments."

(April 1, 1905.)

ADJOURNED SUMMONS.

William Evan Price by his will dated June 30, 1888, gave to his brother, "all his life assurance policies, ready money, and book debts," subject, as the primary fund for that purpose, to the payment of his just debts and funeral and testamentary expenses and the legacies given by his said will and those he intended to give by codicil. And the testator, after making certain other pecuniary and specific bequests, gave to his said brother and to the plaintiffs "all his mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments," subject to the payment of the rest of his debts and legacies, as the secondary fund for that purpose, upon trusts for the benefit of his said brother and his said brother's children, as therein mentioned. And the testator gave all the residue of his real and personal estate (in the events which happened) to the plaintiffs, and appointed them his executors.

The testator made two codicils to his will, and by the second codicil dated June 24, 1898, the testator, after reciting the bequest of "all his mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments" upon trusts as in his will mentioned, and the death of his brother on May 30, 1898, thereby absolutely revoked the said bequest to his said brother and his children, and in lieu of such bequest the testator

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directed and declared that "all the property of every kind included in such bequest" should upon his (the [56] testator's) decease be equally divided amongst all the children of his said brother in manner therein mentioned, and in all other respects the testator confirmed his will and the first codicil.

The testator died on December 16, 1904.

The testator was a solicitor and kept a current account at his bankers, the Torrington branch of the National Provincial Bank. At the date of his will he had no money on deposit with his bankers, but on November 16, 1897, he withdrew 3,200*l.* from his current account and placed the same on deposit account with his said bankers at interest subject to ten days' notice of withdrawal, and from time to time thereafter he withdrew further sums from his current account and placed same on deposit account subject to the like notice of withdrawal; and at his death the total amount so standing to his credit on deposit account was 5,750*l.*

The testator's brother left several children, sons and daughters.

The plaintiffs were two of the sons of the testator's brother.

The questions raised by the summons were—(1) whether the 5,750*l.* passed under the gift of "ready money" to the testator's brother; or (2) whether it passed under the gift of "pecuniary investments" in the second codicil; or (3) whether it passed under the residuary gift of personalty in the will..

Upjohn, K.C., and **Metcalfe**, for the plaintiff. If the money on deposit passes under the words, "ready money," it falls into the residue which goes to the plaintiffs because the testator's brother predeceased him. But it seems that money on deposit at a bank withdrawable on ten days' notice is not "ready money." *In re Wheeler* [1904] 2 Ch. 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586, 91 L. T. N. S. 227; *Mayne* v. *Mayne* [1897] 1 I. R. 324.

[**Farwell**, J.: I am of opinion that if money on deposit with bankers is subject to more than twenty-four hours' notice of withdrawal it is not "ready money."]

Then the next question is whether it is a "pecuniary investment." We submit it is not. The words should be read as *ejusdem generis* with the other species of property described [57] and immediately preceding them in the same gift. In

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Hopkins v. *Abbott* (1875) L. R. 19 Eq. 222, 44 L. J. Ch. N. S. 316, 31 L. T. N. S. 820, 23 Week. Rep. 227, it was held that a banker's deposit note did not pass under a bequest of "securities for money." Until recently many colonial banks allowed interest at a high rate on money placed with them subject to six months' notice, but money so placed cannot properly be described as "an investment," although it earns income. The Court of Chancery (funds) act 1872, and the rules made thereunder, do not treat "money on deposit" as an investment. See Annual Practice 1905, vol. ii. pp. 278, 308–310.

Jenkins, K.C., and **H. Wright,** for the defendants, the daughters of the testator's brother. The question is what the testator meant by the words, "pecuniary investment." The definition of the word "investment" is cited from the Oxford English Dictionary in *In re Rayner* [1904] 1 Ch. 176, 182, 73 L. J. Ch. N. S. 111, 52 Week. Rep. 273, 89 L. T. N. S. 681. It means "some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business." Here the testator obviously intended something not included in anything that was previously mentioned—something not covered by the previous words, but which in its nature was a pecuniary investment; and the court will not be astute to cut down such wide words. The word "investment" is frequently used nowadays in a wide and general sense. Its primary meaning is to get interest. That was the fact here, because the testator transferred the money from his current account to the deposit account.

[**Farwell,** J., referred to *Wilks* v. *Groom* (1856) 3 Drew. 584, 25 L. J. Ch. N. S. 724, 2 Jur. N. S. 681, 4 Week. Rep. 697, 2 Eng. Rul. Cas. 175.]

The general law as to trust investments is not disputed, but it is submitted that money on deposit account at short call and bearing interest is on the terms of this will a "pecuniary investment." The putting the money on deposit is the act of investing. When the act is done it is an investment, and it is a pecuniary investment as contrasted with an investment in land. The object of the deposit was to earn interest, and the rate is immaterial so long as it was done to earn income.

J. A. Simon, for another son of the testator's brother, re-

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ferred to Lewin on Trusts, 11th ed. p. 327, and *Cann* v. *Cann* (1884) 51 L. T. N. S. 770, 33 Week. Rep. 40.

[58] **Farwell, J.:** The testator was a solicitor, and he was a very old man when he made his will in 1888. I get no assistance from the usual extrinsic circumstances, or from putting myself in his armchair, because unfortunately the subject-matter of this particular dispute was not in existence at the time that he made his will. Nor is there assistance to be derived from the inclination of the court to avoid intestacy, because it is not a case between testacy and intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from the man's natural desire to provide for persons having a claim on him as compared with strangers, because it is a case between the children of his brother,—the daughters and the sons. I simply have the will as altered by the codicil. He gives his brother his "policies, ready money, and book debts," and he makes them the primary fund for the payment of his debts, funeral expenses, and legacies. He then gives to trustees "all my mortgages, debentures, and other securities for money, shares, stock, and pecuniary investments, subject to the payment of the rest of my debts and legacies as the secondary fund for that purpose, on trust to continue the same in their present state of investment or to convert the same and invest the proceeds in any manner whatever," and to hold upon trusts for his brother and his brother's children; and this bequest is altered by the codicil in favor of all the brother's children,—the sons and daughters. Then the testator by his will gives the residue of his real and personal estate to his brother, and in the case of his brother's death in his lifetime (which happened) to the three sons of the brother absolutely. In 1897 the testator, having a large sum on current account, placed some of it on deposit with his bankers subject to ten days' notice of withdrawal. The total amount so standing on deposit at his death was 5,750*l*. The question is, Is that sum a "pecuniary investment" so that it passes under the specific gift in favor of the brother's sons and daughters? In my opinion it is not a pecuniary investment, but falls into residue. I think that no one in ordinary parlance speaking of money which he puts on deposit account at his bankers at a short call like this—ten days—taking the usual banker's interest, which is 1 per cent below bank rate, would treat himself as [59] making an investment, or

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as investing in a mode which could be intended by him as an investment to be continued after his death by his trustees "in its present state of investment" within the meaning of those words. It is a little difficult to dogmatize about matters of this sort, and I quite feel the force of the observation that people do use the words "invest" and "investment" nowadays in very odd collocations. On the other hand, the rules of court distinguish between money on deposit and money invested; and certainly Kindersley, V. C., in *Wilks* v. *Groom* (1856) 3 Drew. 584, 25 L. J. Ch. N. S. 724, 2 Jur. N. S. 681, 4 Week. Rep. 697, 2 Eng. Rul. Cas. 175, when he was speaking of the cases in which a trustee is not liable for not investing moneys in his hands, distinguished between cases where he does not improperly omit to invest, where he does not mix the money with other moneys, and where he deposits the money with bankers on a separate account. In the same way, in *Perpetual Executors and Trustees Association of Australia, Ld.* v. *Swan* [1898] A. C. 763, 768, 67 L. J. P. C. N. S. 141, 79 L. T. N. S. 148, 14 Times L. R. 557, Lord Macnaghten, in dealing with a colonial statute authorizing money belonging to a trustee company to be placed with bankers on deposit on certain conditions, makes a statement which I take to be a general statement applying to ordinary men of business as well as to colonial legislators. He says: "The framers of the act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security." The distinction, to my mind, is really plain. The money which is deposited with your banker awaits investment; the fact that it earns interest does not make it an investment. It is immaterial that it produces interest by being put on deposit. I think there is great force in the observation made by Mr. Upjohn that the fact that it earns interest cannot make it an investment, because it is quite within recent times—there may be some banks which do it even now—that banks have allowed interest on current accounts if they exceed a certain amount. The result is that in my opinion this sum falls into residue.

Solicitors: *Kendall, Price, & Francis; Harwood & Pusey; E. B. Titley, Bath.*

Note.—For annotation of the question involved in the foregoing case, see note to *Re Derbyshire, post,* 534.

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[ENGLISH DIVISIONAL COURT.]

IN RE DERBYSHIRE.

WEBB *v.* DERBYSHIRE.

[1906] 1 Ch. 135.
Also Reported in 75 L. J. Ch. N. S. 95, 54 Week. Rep. 135, 94 L. T. N. S. 138.

Wills — Construction — Gift of "moneys owing to me at the time of my decease" — Sums on deposit at banks.

Moneys on deposit at a testator's bank, whether notice of withdrawal is or is not required in respect of the same, will pass under a bequest of "moneys owing to me at the time of my decease."

(November 14, 1905.)

WILLIAM SHIRLEY DERBYSHIRE, a weighing-machine maker, made a will dated November 30, 1883 (whereby he appointed certain persons as executors, but did not name any persons as trustees), which, so far as material, was as follows: "I give, devise, and bequeath all my estate and effects whatsoever, whether real or personal, in possession, reversion, remainder, or expectancy. Upon trust for the following purposes, namely, to collect and get in all moneys owing to me at the time of my decease, and after payment of my just debts and funeral expenses to pay the proceeds in equal parts to my dear wife Dorothy, my son Samuel Derbyshire . . . my daughter Ann Jane Webb, wife of David Webb . . . and my son William Shirley Derbyshire the younger . . . and to pay the income, profits, interest, or rents that may accrue from time to time in similar equal fourth parts. And after the decease of my said wife her share is to be divided into three equal parts between my said children Samuel Derbyshire, Ann Jane Webb, and William Shirley Derbyshire the younger; and if any of my children do not survive my dear wife then the share of such child to go to his or her issue."

The testator died on April 18, 1903, leaving his wife Dorothy and his son Samuel him surviving.

[136] Ann Jane Webb died in December, 1898, leaving four children.

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W. S. Derbyshire, the son, died on September 15, 1900, leaving four children and a widow.

Samuel Derbyshire had a son called Samuel Gabriel Derbyshire.

The testator was entitled at the time of his death to real and leasehold property, a sum of 3,975*l.* on deposit at the Charing Cross Bank (requiring seven days' notice of withdrawal), a sum of 567*l.* 18*s.* 11*d.* on deposit at the Birkbeck Bank, and payable on demand, a sum of about 300*l.* cash in his house, and shares in certain banks and building societies.

On November 11, 1905, on the hearing of an originating summons taken out by David Webb, his Lordship decided, amongst other things, that the testator did not die intestate as to any of his property; that the "moneys owing" to him went to his widow and three children absolutely; that the gift over on the widow's death applied only to property other than the "moneys owing." The question was then argued as to what was included in the expression, "all moneys owing to me at the time of my decease."

MacSwinney, for the plaintiff. Both of the sums on deposit at the banks were "moneys owing" to the testator at the time of his decease. The authorities were discussed in *Mayne* v. *Mayne* [1897] 1 I. R. 324.

In *Carr* v. *Carr* (1811) 1 Meriv. 541, note, Sir William Grant, M.R., held that a balance at a bank passed under a gift of debts "due" to the testator at the time of his death, and pointed out "that when money is paid into a banker's he always opens a debtor and creditor account with the payor."

The House of Lords has decided that from the moment the money is paid into the bank the relation between the banker and the customer is that of debtor and creditor. *Foley* v. *Hill* (1848) 2 H. L. Cas. 28.

It can scarcely be doubted that the deposit at the Birkbeck Bank is money owing, and the fact that notice is required in the case of the deposit at the Charing Cross Bank does not prevent [137] that money from being owing. The debt is like a mortgage debt payable at a future time.

Other cases as to gifts including bank balances are *Vaisey* v. *Reynolds* (1828) 5 Russ. Ch. 12, 6 L. J. Ch. 172, 29 Revised Rep. 4, where a bank balance was held to pass under a bequest

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of "moneys in hand," and *Parker* v. *Marchant* (1843) 1 Phill. Ch. 356, 2 Younge & C. Ch. Cas. 279, 12 L. J. Ch. N. S. 314, 7 Jur. 457, where it was held that bank balances would pass under a gift of "ready money," but the decision in *Carr* v. *Carr* (1811) 1 Meriv. 541, note was there approved. And in *Byrom* v. *Brandreth* (1873) L. R. 16 Eq. 475, 42 L. J. Ch. N. S. 824, 21 Week. Rep. 942, it was held that a gift of "any money of which I may die possessed" included money at the bankers.

But the two classes of cases are not mutually exclusive, and under some circumstances money may be owing and be also ready money.

J. E. C. Adams, for the testator's widow and the widow of W. S. Derbyshire, the son, in support of the same contention, cited *Petty* v. *Willson* (1869) L. R. 4 Ch. 574, 17 Week. Rep. 778 and *Bide* v. *Harrison* (1873) L. R. 17 Eq. 76, 43 L. J. Ch. N. S. 86, 29 L. T. N. S. 451.

W. Higgins, for Samuel Derbyshire and Samuel Gabriel Derbyshire. The moneys on deposit do not pass as "moneys owing." The expression at the outside only includes debts which are immediately payable. *Dawes' Case* (1868) L. R. 6 Eq. 232, 37 L. J. Ch. N. S. 901, 16 Week. Rep. 995; *In Re European Life Assurance Society* (1869) L. R. 9 Eq. 122.

P. M. Walters, for a child of W. S. Derbyshire, the son, and a child of Ann Jane Webb. The deposits at the banks are not within the gift of "moneys owing." There is no necessity to show the meaning of the words, for here there is in effect a gift of the residue. The testator is described in the will as a weighing-machine maker, and he meant by the expression "moneys owing" to pass only his trade debts.

There is a difference between income-producing and non-income-producing debts, and the former do not pass under such a gift as this.

The decision in *Parker* v. *Marchant* (1843) 1 Phill. Ch. 356, 2 Younge & C. Ch. Cas. 279, 12 L. J. Ch. N. S. 314, 7 Jur. 457 and *Carr* v. *Carr* (1811) 1 Meriv. 541, note, both related to accounts current, not to moneys on deposit. *Vaisey* v. *Reynolds* (1828) 5 Russ. Ch. 12, 6 L. J. Ch. 172, 29 Revised Rep. 4, is inconsistent with *Carr* v. *Carr* (1811) 1 Meriv. 541, note.

[138] It has been held that moneys on deposit in respect of which a withdrawal notice is required will not pass under a be-

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quest of "ready money" or of "pecuniary investments." *In re Price* [1905] 2 Ch. 55, *ante*, 529, 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44. [He also referred to *Manning* v. *Purcell* (1855) 7 De G. M. & G. 55, 3 Eq. Rep. 387, 24 L. J. Ch. N. S. 522, 3 Week. Rep. 273 and *Stein* v. *Ritherdon* (1868) 37 L. J. Ch. N. S. 369, 19 L. T. N. S. 184, 16 Week. Rep. 477.]

H. C. Seddon, for other parties.

Buckley, J.: This testator, at the time of his death, had a sum of 3,975*l.* on deposit at the Charing Cross Bank, payable on seven days' notice, and a sum of 567*l.* 18*s.* 11*d.* on deposit at the Birkbeck Bank, payable on demand.

By his will he gave all his real and personal property to trustees upon trust "to collect and get in all moneys owing to me at the time of my decease, and after payment of my just debts and funeral expenses to pay the proceeds in equal parts to" his wife and three children, and to pay the income, profits, interest, or rents that might accrue from time to time in similar fourth parts, and directed that after the decease of his wife her share was to be divided into three equal parts between the same three children, and that if any of his children should not survive his wife the share of such child was to go to his or her issue.

It has been contended that I ought to draw the inference that the term "moneys owing to me" is to be construed as being used by way of contrast with moneys producing income and as not including moneys on deposit and bearing interest, but I do not think that I should be justified in so doing.

It was decided by the House of Lords in *Foley* v. *Hill* (1848) 2 H. L. Cas. 28, that the relation between a banker and a customer who pays money into the bank is by the contract between them that of debtor and creditor, and that that relation exists prior to the moment when the customer draws a cheque on the bank. In *Parker* v. *Marchant* (1843) 1 Phill. Ch. 356, 361, I find the Lord Chancellor saying this: "Sir William Grant, after some hesitation, was of opinion that the balance at the banker's would pass under the description of a debt owing to the testator. He said, and I think he justly [139] said, it is a debt, and may be recovered as a debt; and five or six years afterwards, in the decision of *Devaynes* v. *Noble* (1816) 1 Meriv. 529, 15 Revised

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Rep. 151, 3 Eng. Rul. Cas. 329, he held the same language, upon the same principle,—that the balance at the banker's is a debt due to the party who deposits the money. The money is not to be returned in specie; the engagement is, to be ready to pay an equal amount when called for. . . . Sir William Grant, under these circumstances, there being a distinct disposition or bequest of debts owing to the testator, and this being in point of law a debt, and there being nothing to restrain the operation of it or to show a contrary intention on the face of that will, decided, after some consideration, that the banker's balance would pass under the description of a debt; and nobody can question the correctness of that decision." The case in which Sir William Grant so decided was *Carr* v. *Carr* (1811) 1 Meriv. 541, note. In that case the testator had given whatever debts might be due to him at the time of his death, and Sir William Grant held that the gift passed money at his bank although no cheque had been drawn on the account before his death.

There are several cases—I may mention *Mayne* v. *Mayne* [1897] 1 I. R. 324; *In re Wheeler* [1904] 2 Ch. 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586, 91 L. T. N. S. 227, and *In re Price* [1905] 2 Ch. 55, *ante,* 529, 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44—which go to show that where the bequest is of "ready money" money on deposit with a testator's bankers will pass where notice of withdrawal is not required, but will not pass where notice of withdrawal is required, and on the authority of these cases it has been argued before me that the money on deposit at the Birkbeck Bank, in respect of which notice of withdrawal is not required, will not pass as money owing because it is ready money. But the terms "ready money" and "money owing" are not mutually exclusive, and it seems to me that money may be both ready money and money owing. I think that the money at the Birkbeck Bank passes under the words.

As to the money at the Charing Cross Bank, in respect of which notice of withdrawal is required, the relevant considerations seem to be these: If in the case of moneys standing to the [140] credit of current account with a banker, the relation of debtor and creditor exists though no demand for payment has been made, moneys on deposit payable after notice must, I think, be moneys owing, although notice of withdrawal is necessary and has not been

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given. The money on current account and the money on deposit at notice are alike moneys due but not payable. I think that the money at the Charing Cross Bank passed by the words.

In *Petty* v. *Willson* (1869) L. R. 4 Ch. 574, 575, Selwyn, L.J., said: "It would be making a fanciful distinction to say that this money, which clearly forms part of the testator's estate, was not owing to the testator, because it could not, in any event, be paid to himself, but must be received by his representatives. The case in this respect differs but little from that of money owing to the testator on a promissory note and payable on a day which did not arrive till after his decease." And in the same case Giffard, L.J., said: "It would be much too refined to say that this money was not due and owing to him, because it was payable not to him but to his executors."

It would be distinguishing where there was no real difference if I drew any distinction between deposits where notice of withdrawal was and deposits where notice was not required.

I hold that both sums are "moneys owing" within the meaning of the will.

Solicitors for all parties except Samuel Derbyshire and Samuel G. Derbyshire: *Hilder, Thompson, & Dunn.*

Solicitors for S. Derbyshire and S. G. Derbyshire: *E. J. Bridgman.*

Note.—Sufficiency of bequest to pass bank deposit.

The chief source of the ambiguity which gives rise to the question above stated is in the anomalous character of bank deposits, which, though they are, technically speaking, only debts owing by the bank to the depositor, are, from the fact that they are ordinarily paid on demand, even where the bank has reserved the privilege of requiring previous notice, commonly spoken of as "money" or "ready money." Whether or not they fall within a particular description depends upon the intention of the testator as manifested by the language of the will and its general scheme of disposition, read in the light of the surrounding circumstances.

Bequest of "all my money."

In *Manning* v. *Purcell* (1855) 7 De G. M. & G. 55, 3 Eq. Rep. 387, 24 L. J. Ch. N. S. 522, 3 Week. Rep. 273, a bequest of "all my moneys" was held to include money standing to testator's credit in

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the bank upon an ordinary current account, and also a sum standing there upon a deposit account, which by the custom of the bank with respect to such accounts was payable upon the indorsement and delivery up by the depositor, or person claiming under him, of the receipt given by the bank for such deposit when made.

In *Dabney* v. *Cottrell* (1853) 9 Gratt. 575, it was held that a bequest to testator's wife of his plantation, slaves, "all my plantation utensils, my household and kitchen furniture, and all the money," included money in the savings bank, the court saying: "In every other respect a deposit with a savings institution would seem to be a stronger case for treating it as money than at a private banker's; for by the rules and regulations of such institutions the money is always to be returned within a certain period after it is called for. It does not appear what were the regulations of this particular institution. But in the ordinary transactions of life we know that such deposits are not regarded as investments in the common acceptation of the term. The depositor consents to accept of a low rate of interest, because he regards it as a fund upon which he can always rely upon giving a short notice, required for the convenience of the depositary."

Where the fact that all the property of the testator, after excepting what is specifically devised, is not enough to satisfy the bequests made by him without taking a part of his savings bank deposits or railroad stock, indicates an intention on the part of the testator to dispose of all his property, and the will contains no residuary clause, a savings bank deposit will pass under a gift of "all my moneys after paying all my just debts." *Jenkins* v. *Fowler* (1884) 63 N. H. 244.

Bequest of "ready money."

In *Taylor* v. *Taylor* (1837) 1 Jur. 401, Lord Langdale, M. R., in holding that money in bank passed by the description of "ready money," said: "It is true that in strict legal language what is called money deposited at a banker's is nothing more than a debt, and cannot be called ready money, but in the ordinary language of mankind money at a banker's is called ready money, and we must construe a will according to the ordinary language of mankind."

In *Parker* v. *Marchant* (1843) 1 Phill. Ch. 356, affirming 1 Younge & Ch. Cas. 290, it was held that a gift in the testator's will of "all the rest and residue of my ready money, securities for money and moneys in the funds" passed, under the words "ready money," two balances in the bank to the testator's credit, as to which it did not appear that interest was payable or that they were subject to any limitation, restriction, or condition of any description, where the frame of the will indicated that such was testator's intention, Lord Lyndhurst saying: "In construing a will of personal property, the terms that are used in the will are to be construed according to the

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ordinary acceptation of language in the transactions of mankind; and nobody can doubt that, in the ordinary use of language, money at a banker's would be considered as ready money. Everybody speaks of the sum which he has at his banker's as money,—'my money at my banker's' is a usual mode of expression. And if it is money at the banker's, it is emphatically ready money, because it is placed there for the purpose of being ready when occasion requires; it is received upon the understanding that it shall be so ready. If a man goes to his banker, the money is counted out to him on the table. If he sends an order for the money, it is counted out to his servant, or the person in whose favor that order is made. I consider, therefore, that it is strictly ready money according to the ordinary acceptation of those terms among mankind."

A gift of "ready money" will pass sums of money in bank on drawing account, and on deposit for which no notice of withdrawal is necessary. *Stein* v. *Ritherdon* (1868) 37 L. J. Ch. N. S. 369, 19 L. T. N. S. 184, 16 Week. Rep. 477.

In *Re Price* [1905] 2 Ch. 55, *ante*, 529, 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44, it was held that a bank deposit subject to more than twenty-four hours' notice of withdrawal did not pass under a bequest of "ready money," nor, in the absence of a special indication, under a bequest of "pecuniary investments."

Money on deposit at a bank, withdrawable at fourteen days' notice, does not pass under a bequest of "ready money." *Re Wheeler* [1904] 2 Ch. 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586, 91 L. T. N. S. 227.

But a mere power to require notice for money, according to practice payable on demand, does not prevent money deposited from being "ready money." *Re Cosgrove* (1909) Times, 3d April, cited in 28 Laws of England (Halsbury) 708, note (r).

In *Re Powell* (1858) Johns. U. C. (Eng.) 49, cash of a testatrix at a savings bank, as to which she had given notice requiring payment, and which only awaited her receipt, was held to pass by a bequest of "all my ready money" in a will which contained various specific bequests, and no residuary bequest.

As to effect of bequest of "ready money in bank," see *Mayne* v. *Mayne* [1897] 1 I. R. 324; *Re Rodmell* (1913) 108 L. T. N. S. 184, 57 Sol. Jo. 284, 323, note, under catchline, "Scope of bequests of cash or money in bank," *infra*.

Bequest of "money on hand" or "money in my possession."

In *Vaisey* v. *Reynolds* (1828) 5 Russ. Ch. 12, 6 L. J. Ch. 172, 29 Revised Rep. 4, a bequest of "moneys in hand," rather than a bequest of "moneys out at interest on mortgage notes at hand or any other security whatsoever," was held to pass a balance in the hands of testator's banker, which, though it carried interest, was in no sense

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money on security, while in a reasonable sense it was money in hand.

Where there is nothing to indicate that the testatrix used the word "money" in any sense different from the ordinary acceptation, the reasonable inference is that she meant by the phrases, "money on hand" and "money remaining at my decease," money in her actual possession and control and available for immediate use, not money invested or deposited at interest in a savings bank at a distance and from which it could be drawn only at certain times and under certain conditions prescribed by the rules of the bank. *Hancock* v. *Lyon* (1892) 67 N. H. 216, 29 Atl. 638.

In *Byrom* v. *Brandreth* (1873) L. R. 16 Eq. 475, 42 L. J. Ch. N. S. 824, 21 Week. Rep. 942, a bequest of "any money of which I may die possessed" was held to include money in the bank of which immediate payment might have been claimed at any time, though not the apportioned part of the interest on the balance at the banker's, which was payable half-yearly.

And an exception in a bequest by testator to his wife of his land, farming utensils, stock, and "everything except . . . money in my possession," which his executors were directed to keep loaned out for the benefit of his wife and children, includes any money of the testator on deposit in bank at the time of his death. *Shelby* v. *Shelby* (1837) 6 Dana, 60.

In *Beck* v. *McGillis* (1850) 9 Barb. 35, a bequest of the moneys of which the testator should die possessed was held to include the cash which at the time of his death the testator had in his possession or deposited in bank.

Bequest of "securities."

In *Hopkins* v. *Abbott* (1875) L. R. 19 Eq. 222, 44 L. J. Ch. N. S. 316, 31 L. T. N. S. 820, 23 Week. Rep. 227, it was held that a bequest of "all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all money due thereon," did not pass money in an interest-bearing deposit account payable on demand, such money being in the same situation as if it were in an ordinary drawing account, and so not within the bequest of "securities for money."

A bequest of "all moneys and securities for money absolutely" will not carry money lodged with a bank on fixed deposit, though it will pass money on current account and money in the savings bank. *Re Reed* [1911] Vict. L. R. 232.

In *Re Saxby* [1890] W. N. 171, money on deposit in the postoffice savings bank was held to pass under a gift in a will of "money invested in consols or other securities."

In *Archibald* v. *Hartley* (1852) 21 L. J. Ch. N. S. 399, it was held that a bequest of dividends arising from the personal estate of testatrix invested at her decease in or upon any stocks, funds, or se-

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curities whatsoever yielding interest, does not carry interest allowed by a bank on a balance standing to the credit of the testatrix.

As to the effect of a bequest of all the "securities" in a certain place to carry title to bank books found there, see case set out under catchline, "Bequests of contents of, or property, effects, etc., contained in, a place or receptacle," *infra.*

As to whether a bequest of "pecuniary investments" will carry money on deposit, see *Re Price* [1905] 2 Ch. 55, *ante,* 529, 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44.

Bequests of "debts" or "accounts."

In *Carr* v. *Carr* (1811) 1 Meriv. 541, note, a bequest of whatever debts might be due to him (the testator) from the legatee or others at the time of his death was held, though with an expression of doubt, to include money at a banker's, Sir William Grant, M. R., saying that it would not pass by the description of ready money, and therefore it must be considered as a debt and pass by that description.

A bequest of "moneys owing to me at the time of my decease" will pass a bank deposit, whether notice of withdrawal is or is not required. Re Derbyshire.

A savings bank deposit is not embraced in a bequest of "all my accounts," where there were actual and proper accounts which the testator held against individuals upon which the term used in the will could operate, and where the effect of such a construction would be to leave nothing for the residuary legatee and disturb an equality of distribution among the testator's relatives. *Gale* v. *Drake* (1871) 51 N. H. 78.

Money in bank for which the testator had a certificate of deposit is not a debt due to the estate, and as such within a direction to "collect all the debts due me" and invest proceeds for the benefit of minor children. *Adams* v. *Jones* (1861) 59 N. C. (6 Jones, Eq.) 221, in which the court said: "The common understanding, we think, is to regard a deposit in the bank as cash (at any rate prior to a demand and refusal), and not as a debt due. In making out a descriptive list of one's estate it would be certainly so classed."

A bequest of "all moneys that may be due me at the time of my decease from my undertaking business or from any other source whatever, also whatever money I may have in my business bank," will not include savings bank deposits, where the effect of such construction will be to leave no fund for the payment of pecuniary legacies, although, as the will contains no residuary clause, the result is to leave the balance remaining after payment of legacies undisposed of. *Re Hawks* (1898) 24 Misc. 56, 53 N. Y. Supp. 372.

Bequest of "outstanding debts" as carrying certificates of deposit, see *Boyd* v. *Satterwhite* (1862) 12 Rich. Eq. 487, under catchline, "Scope of bequests of cash or money in bank," *infra.*

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Bequests of books and papers.

A bequest of "all my books and papers" will not be construed to include bank books or the moneys on deposit represented thereby, where the testator left among his effects a large number of books, and where the effect of adopting such construction would be that the residuary legatee would receive nothing. *Re Jeffreys* (1905) 1 Cal. App. 524, 82 Pac. 549.

A bequest of "all my household effects, books, and papers of value, and everything the house contains," does not include a savings bank book with the deposits represented thereby. *Webster* v. *Wiers* (1884) 51 Conn. 569.

A bequest of "books and papers of every description," though ordinarily broad enough to include promissory notes, bonds, certificates of stock or of deposits, and other evidences of debts due to the testator, and to transfer as incident thereto the property, moneys, rights, and choses in action of which such papers are the representatives, will not be so construed where the will contains a specific bequest of the money on deposit in a certain bank, which is described in appropriate language. *Mathes* v. *Smart* (1871) 51 N. H. 438.

A bequest to a grandson of "certain books marked with his name," in a clause by which the testator gave articles of no value except as family remembrances, will not include a bank book so inscribed, when it appears that the deposit evidenced thereby was not intended as a gift, where other clauses of the will made substantial provision for the legatee, and where under any construction of the will the testator died intestate as to a portion of his estate. *Jackson* v. *Piscataqua Sav. Bank* (1900) 70 N. H. 283, 47 Atl. 613.

Bequests of "personal property."

A bequest to the daughters of the testatrix of all her "household goods, wearing apparel, and personal property," will not include money in the bank, the general effect of the words "personal property" being limited by the words preceding; although in the next and residuary clause of the will testatrix directed the rest of her property to be sold and the cash distributed among her four children. *Gibbons's Estate* (1909) 224 Pa. 37, 73 Atl. 183.

Money in bank does not pass under a bequest by a testator who owned a cigar manufacturing business, personal effects, money in bank amounting to $1,100, and real estate worth $200,000, of the "remainder of his personal property, including his cigar business," to a brother. *Stender* v. *Stender* (1914) 181 Mich. 648, 148 N. W. 255.

As to the effect of a bequest of "personal property" in a house to carry bank books and the deposits evidenced thereby, see cases under catchline, "Bequests of contents of, or property or effects contained in, a place or receptacle," *infra*.

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Bequests of a business and things connected therewith.

A bank balance, though strictly speaking a chose in action, will not pass under a bequest of "all horses, harness, wagons, machinery, and other personal property used in my butchering business, including all choses in action," where there were outstanding accounts due by customers to answer the description, and it appeared that the bank account was used by the testator for purposes in no wise connected with his business as butcher, and that it was not necessary to the conduct of that business, and where the exclusion of the bank balance from such description would operate to put all testator's children on an equality. *Koss* v. *Kastelberg* (1900) 98 Va. 278, 36 S. E. 377.

A bequest of a grocery store "together with all accounts, claims, and debts due and owing me growing out of said business," does not embrace bank deposits, though they had arisen wholly from the receipts of the store, where there was nothing in the will to indicate that the words quoted were used in any sense different from their ordinary acceptation, where no other funds were available for the payment of debts, funeral expenses and costs of administration. *Wyatt* v. *Norris* (1910) 66 W. Va. 667, 66 S. E. 1016.

Under a bequest by a mother to her daughter of her "printing office and bindery, together with all the presses, binding machinery, type, paper on hand, office furniture, and equipment of every nature connected with said business," money in banks does not pass, but forms part of the residue. *Re Lowe* (1911) 73 Misc. 178, 132 N. Y. Supp. 478.

Scope of bequests of cash or money in bank, etc.

A bequest of "cash at my banker's" includes only money on current drawing account and such of the money on deposit as is payable on demand. *Re Boorer* [1908] W. N. 189.

A bequest of "all cash on hand and in bank" will carry a certificate of deposit,—especially where such construction will effectuate the apparent intention of the testatrix to make as nearly as possible an even distribution of her estate among those nearest her in blood and by affection. *Offutt* v. *Troll* (1911) 159 Mo. App. 90, 139 S. W. 487.

A bequest of "all my cash in bank" will pass money on deposit with a loan company. *Re Cooper* (1913) —Ont. —, 13 D. L. R. 261, affirmed on other grounds in 14 D. L. R. 172.

A bequest of "ready money in bank" will carry money on deposit receipt which may be withdrawn without previous notice to the bank; but will not carry deposit receipts for the withdrawal of which notice is necessary, and it makes no difference that the notice may often or usually be waived. *Mayne* v. *Mayne* [1897] 1 I. R. 324.

But in *Re Rodmell* (1913) 108 L. T. N. S. 184, 57 Sol. Jo. 284,

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323, note, it was held that a bequest of "ready money standing in my name or to my credit at my bank" will include money on deposit account, where by the actual course of business between the testator and his bankers the account was treated in precisely the same manner as a current account.

In *Lyons* v. *Lyons* (1915) 224 Fed. 772, it was said that the technical definition of "money in bank," which excludes time and savings deposits and is held to apply only to checking accounts, is contrary to all common understanding.

In this case it was held that having in view the circumstances of the testator, who at the time of the making of his will was past sixty years of age, childless, a cripple, and retired from active business, and who had talked over the matter with his wife and made a reasonable provision for her, and the fact that his funeral expenses, debts, and costs of administration exceeded by several hundred dollars the whole amount of his checking deposit, a bequest to his brother of "the residue of my money in bank remaining after the payment of my aforesaid funeral expenses, debts, costs, and expenses of administration of my estate and the legacies aforesaid," included not only his checking account, but also a number of certificates of time and savings deposits in various banks.

A bequest of "all moneys at my death in the house or in the Bank of Scotland or the City Bank of London, or in any other bank or banks in my name," will carry a deposit receipt payable four years after its date. *Harper* v. *Bain* (1903) 5 F. 716, (as digested in 15 Mew's English Case Law Digest, 1898–1910, 2055).

Under a bequest of "all money in the house and bank or on hand at the time of my death," money deposited in the bank in the name of a firm of which the testator was a member will not pass, where there is money in the bank to the credit of his individual account which still satisfy the description. *Re Wilkinson* (1899) 192 Pa. 127, 43 Atl. 441.

A bequest of "all my bank stock of money," rather than a bequest of "outstanding debts," will carry certificates of deposit, it not appearing that the testator owned anything else to which the term "bank stock of money" was applicable. *Boyd* v. *Satterwhite* (1862) 12 Rich. Eq. 487.

A bequest of "all I hold in the national bank" will include a deposit receipt as well as a cash balance. *Townsend* v. *Townsend* (1877) Ir. L. R. 1 Eq. 180.

Under a bequest of money "in savings banks," money on deposit with trust companies operating savings bank departments may pass where such construction is necessary to prevent an intestacy, and to carry out testator's intention to dispose of all his property. *Cook* v. *Cook* (1913) 35 R. I. 342, 86 Atl. 899.

A bequest of "all moneys due me at the time of my decease from Dedham Bank, Dedham," will not embrace moneys of the testator on

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deposit in the "Dedham Institution for Savings," usually known as the "Dedham Savings Bank," there being in that town another institution usually known as the Dedham Bank; and parol evidence is not admissible to show that the testator at the time of making his will and at his death had money on deposit in the Dedham Institution for Savings and never had money on deposit in the Dedham Bank. *American Bible Soc.* v. *Pratt* (1864) 9 Allen, 109.

Bequests of contents of, or property, effects, etc., contained in, a place or receptacle.

In *Re Reynolds* (1891) 124 N. Y. 388, 26 N. E. 954, affirming 55 Hun, 603, 9 N. Y. Supp. 949, which affirmed 7 N. Y. S. R. 725, it was held that a devise of a building "including all the furniture and personal property in and upon the same or in any manner connected therewith," did not pass title to bank books contained in the safe on the premises, the court saying that the general rule of construction that, in the absence of a showing of an intention to the contrary, general words used in connection with words of specific import will be restricted to things of the class or classes enumerated, will be applied, at least where there is a residuary clause which prevents intestacy as to any portion of the estate.

A bequest of "all the personal property in the house and in the other buildings on said premises" will not include certificates of deposits and pass books representing money in bank, where the will contains a residuary clause under which such property will pass. *Ball* v. *Dixon* (1894) 83 Hun, 344, 31 N. Y. Supp. 990.

In *Re Delaney* (1909) 133 App. Div. 409, 117 N. Y. Supp. 838 (affirmed without opinion in 196 N. Y. 530, 89 N. E. 1098), a bequest of "all the household furniture and personal property of whatsoever kind in my dwelling house," was held not to include a bank book and the money evidenced thereby, though the will contained no residuary clause under which such bank deposit would pass, where it, in fact, disposed of all property owned by the testatrix at the time of its execution.

In *Fenton* v. *Fenton* (1901) 35 Misc. 479, 71 N. Y. Supp. 1083, a bequest, following the devise of a house, of "all the contents of any kind and nature therein contained . . . and the furniture and all the contents thereof," did not include bank books found in a safe in the house, the terms of the will, taken as a whole, and considered in connection with the theory that, if possible, effect must be given to all the provisions of the will, manifesting a lack of intention to pass the securities under the quoted provision.

The gift of a house and its contents does not include money which had been deposited in the bank during the illness of the testatrix, without her instructions, although she was subsequently told it had been done, where presumably she would herself have put it in, and

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it cannot be said that in the ordinary course of things it would have been in the house at her death. *Re Lea* (1911) 104 L. T. N. S. 253.

A testamentary disposition of all the securities in certain vaults does not carry bank books found therein, as such books do not answer to the description of securities,—especially where the testator himself in his will distinguished between money deposited and securities. *Lyon* v. *Safe Deposit & T. Co.* (1913) 120 Md. 514, 87 Atl. 1089.

In *Re Robson* [1891] 2 Ch. 559, 60 L. J. Ch. N. S. 851, 65 L. T. N. S. 173, it was held that a bequest of a "desk with the contents thereof" passed, among other things therein contained, a receipt for a bank deposit, it being said that the things in question were not only such as were usually kept in a desk, but that it was clearly the intention of the testator to pass the choses in action therein contained to the legatee.

In *Gaff* v. *Cornwallis* (1914) 219 Mass. 226, 106 N. E. 860, it was held that a bequest of the contents of a safe-deposit box passed, *inter alia,* two bank books found therein, the court saying: "It seems clear that by the bequest of the 'contents' of this safe-deposit drawer or box the testatrix intended to give to the plaintiff the property in question. This place of security was under the sole control of the testatrix. She alone knew what valuable papers she had deposited or intended to deposit therein. Her language, by its plain meaning, embraced whatever securities and property she might have in the box at the time of her death, except such as were otherwise disposed of by the will, or from their nature would not be the subject of a devise or bequest." E. S. O.

[ENGLISH COURT OF APPEAL.]

PORTER *v.* FREUDENBERG.

KREGLINGER *v.* S. SAMUEL & ROSENFELD.

IN RE MERTEN'S PATENTS.

[1915] 1 K. B. 857.

Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.

Alien enemy — Right to sue — Liability to be sued — Right to appear and defend — Right of appeal.

The test of a person being an alien enemy is not his nationality, but the place in which he resides or carries on business. A person voluntarily resident in, or who is carrying on business in, an enemy's country is an alien enemy.

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An alien enemy, unless he be within the realm by the license of the King, cannot sue in the King's courts.

An alien enemy may be sued in the King's courts.

An alien enemy who is sued has a right to enter an appearance and to defend the action; he has also the right to appeal against any decision, final or interlocutory, that may be given against him. But an alien enemy who is plaintiff in an action commenced before the [858] outbreak of war has no right of appeal; his right to appeal is suspended until the conclusion of peace.

Where an action is brought against an alien enemy resident in the enemy's country, who carries on a branch business in this country by means of an agent, leave may be given to the plaintiff to issue a concurrent writ and to make substituted service of a notice of the writ by service of the notice upon the defendant's agent in this country.

(January 19, 1915.)

PORTER *v.* FREUDENBERG.

APPEAL of the plaintiff from an order made at chambers by Scrutton, J., giving leave to issue a concurrent writ against the defendant, an alien enemy, and to serve notice of it upon the defendant at Berlin.

The action was brought to recover a quarter's rent due on September 29, 1914, under a lease made in 1903, at a rental of 625*l.*, of certain premises in Princes street, Hanover Square. The defendant resided and carried on business as a mantle manufacturer at Berlin, in the Empire of Germany, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the plaintiff's affidavit, a quantity of stock was usually kept on the premises, but immediately before September 29, 1914, the whole of the stock, fixtures, and fittings was removed from the premises. On September 28 the keys of the premises were sent to the plaintiff by Barnes, and the plaintiff intimated that they would be held at the disposal of Barnes as the agent of the defendant.

After the issue of the writ the plaintiff applied at chambers to Scrutton, J., for directions as to the manner of serving the writ upon the defendant in Berlin. Scrutton, J., gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ upon him in Berlin.

The plaintiff appealed.

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Cecil Fitch, for the plaintiff. This appeal raises substantially two questions: First, whether an alien enemy who owes a debt to a British subject can be sued at all; and, secondly, if he can, how he can be brought before the court. On the first point it is submitted that the defense of "alien enemy," if there is such a [**859**] defense, does not depend upon statute, and that there is no principle of the common law which forbids an enemy to be sued. The Proclamation of September 9, 1914, under the trading with the enemy act, 1914, in paragraph 7 says that "nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business, or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted." That obviously contemplates that, where possible, alien enemies should be made to pay their debts. On the second point, Scrutton, J., has given the plaintiff leave to serve notice of the concurrent writ out of the jurisdiction in Berlin; but such service is practically impossible, and the plaintiff asks for leave for substituted service of notice of the writ upon Barnes, the defendant's agent in England.

The defendant was not represented.

KREGLINGER *v.* S. SAMUEL & ROSENFELD.

Appeal from a similar order of Scrutton, J., in chambers giving the plaintiffs leave to serve notice of a concurrent writ upon the defendants in Germany.

The plaintiffs were skin and hide merchants, carrying on business in London and at Antwerp. Before the outbreak of war they had entered into contracts for the sale of cargoes of hides from Australia to the defendants, who carried on business in London. Before the outbreak of war the defendants intimated that they did not intend to carry out the contracts. After the outbreak of war a writ was issued, and the plaintiffs claimed to have effected proper service of it upon the defendants by leaving it upon one Bonome, a person who appeared to be in control or management of the business here (see order xlviiia, r. 3). Bonome entered a conditional appearance and applied to set aside the service. Scrutton, J., set it aside upon the ground that one Alfred Cohen, who resided at Hamburg, was the sole pro-

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prietor of the business of S. Samuel & Rosenfeld, and therefore order xlviiia, r. 3, did not apply, as there were not two or more partners carrying on business within the jurisdiction. In the plaintiffs' application, Scrutton, J., gave leave to issue a concurrent [860] writ against Alfred Cohen, with liberty to serve notice of the writ at Hamburg, in Germany, but refused leave to make substituted service of the notice of the writ by serving it upon Bonome, thinking himself bound to refuse by reason of the decision in *Wilding* v. *Bean* [1891] 1 Q. B. 100, 60 L. J. Q. B. N. S. 10, 64 L. T. N. S. 41, 39 Week. Rep. 40.

The plaintiffs appealed, asking the court for leave to effect substituted service of the writ on Bonome.

Storry Deans, for the plaintiffs. The contract was a c.i.f. contract, and the defendants refused to accept delivery of the hides at Dunkirk. The contract was made at Bermondsey with the defendant firm in this country. The plaintiffs did not know that the person carrying on the firm's business in this country was a German subject at Hamburg. The plaintiffs ought to have leave for substituted service of notice of the writ on Bonome. By the Trading with the Enemy Proclamation No. 2, September 9, 1914, paragraph 3, "enemy" means "any person or body of persons of whatever nationality resident or carrying on business in the enemy country," and paragraph 6 provides that "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy." Cohen resides at Hamburg and carries on business there. He also carries on business in London under the style of Samuel & S. Rosenfeld, Bonome managing the business here. The branch business in London comes within paragraph 6 of the Proclamation. Therefore the plaintiffs can transact business with the branch. Bonome, in his affidavit in support of the application to set aside the service of the writ upon him, stated that he managed the London branch of the Hamburg business. The service of the original writ upon Bonome was, as the facts subsequently turned out, wrong. *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency* [1893] 2 Q. B. 96, 62 L. J. Q. B. N. S. 485, 4 Reports, 441, 69 L. T. N. S. 329, 41

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Week. Rep. 563; order xlviiia, r. 3. The plaintiffs in these circumstances ought to have leave for substituted service of notice of the concurrent writ. It is admitted that there is no rule of court applicable to such a case. Where an enemy is plaintiff in such a case a plea [861] in abatement was formerly the proper plea. Bullen and Leake's Precedents of Pleading, 3d ed. p. 475; now an application should be made to stay proceedings. There is no authority upon the matter when the defendant is an enemy. The language of order lxvii., r. 6, covers this case. Prompt personal service cannot be effected, and the court may order substituted service. *Wilding* v. *Bean* [1891] 1 Q. B. 100, 60 L. J. Q. B. N. S. 10, 64 L. T. N. S. 41, 39 Week. Rep. 40, upon which Scrutton, J., decided this case, turned on a wholly different point; the question there was as to substituted service of a writ in the ordinary form for service within the jurisdiction; that case does not affect the present one. The cases of *Ford* v. *Shephard* (1885) 34 Week. Rep. 63, 53 L. T. N. S. 564, and *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge* [1905] 2 Ch. 472, 74 L. J. Ch. N. S. 751, 54 Week. Rep. 62, 93 L. T. N. S. 664, show that the court has jurisdiction to make the order. An alien enemy can be sued, and the court in its discretion will give facilities for effecting service of the writ.

The defendants were not represented.

In re Merten's Patents.

Notice of motion asking the court to set aside the notice of appeal of the Deutsches Mertens Gesellschaft from an order of Warrington, J.

In this case Soldan & Company, Limited, an English company, had presented a petition for revocation of a patent granted to a German subject resident in Germany, of which patent the Deutsches Mertens Gesellschaft, a German company, were the owners. Warrington, J., made an order for the revocation of the patent, but, if notice of appeal were given on or before August 28, 1914, the operation of the order was to be suspended until the hearing of the appeal. Notice of appeal was given on August 28, 1914, after the outbreak of war between this country and Germany.

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The petitioners moved to set aside the notice of appeal on the ground that the defendants were alien enemies.

A. J. Walter, K.C., and **Courtney Terrell**, for the motion. The notice of motion asks for an order setting aside the notice of [862] appeal of the Deutsches Mertens Gesellschaft as invalid on the ground that the appellant company are and were at the date of their notice alien enemies of his Majesty and not competent to take any step in the proceedings. It is doubtful, however, whether this ought to be done, for an appeal is a step in an action and the enemy is in the position of a defendant. Before the common law procedure act 1852, an appeal was by writ of error, but by § 148 of that act a writ of error was made unnecessary, and the proceeding is a step in the cause. Lush's Practice, 3d ed. vol. 2, p. 657. The law appears to be that if an alien enemy is brought into court as a defendant he is entitled to appear and take any step in the action, including a right to appeal; although he has no right to appear as a plaintiff. The Mertens Company are in the position of defendants, and they appeared before Warrington, J., before the war broke out, so it is difficult to say that they have no right to appeal. By the order of Warrington, J., the patent is revoked, but the operation of the order is suspended until the appeal has been disposed of. If that suspension is removed, the plaintiffs will at once lodge the order, and the patent will be removed from the register, and it will not be possible to restore it without an act of Parliament. But in the meantime, if the appeal is not heard and the order stands, the Mertens Company will keep their patent indefinitely. Therefore it is to the interest of the plaintiffs that the appeal should be heard. Alien enemies have been heard in this court; for instance in *Janson* v. *Driefontein Consolidated Mines* [1901] 2 K. B. 419, 70 L. J. K. B. N. S. 881, 49 Week. Rep. 660, 85 L. T. N. S. 104, 17 Times L. R. 604, 6 Com. Cas. 198, [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268, where rules on the subject were stated by Lord Davey [1902] A. C. at p. 499. In that case the alien enemies were plaintiffs.

[**Swinfen Eady**, L.J.: The practice is that an order for revocation is registered on the application of the successful peti-

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tioner, and if the order is reversed by the Court of Appeal the order of that court is entered on the register and the patent is thereby resuscitated. Frost on Patents, 4th ed. vol. 1, p. 307, relying on *Deeley* v. *Perkes* (1896) 13 R. P. C. 581, 586, and *In re Armstrong's Patent* (1897) 14 R. P. C. 747, 755.

[**863**] According to the usual practice the patent is not resuscitated by the order of the Court of Appeal. No distinction is suggested between appeals in patent cases and any other appeals, but it is submitted that the court is competent to hear this appeal, and the petitioners object to having it kept hanging over their heads. Alien enemies can be sued, though they cannot sue. Lush's Practice, 3d ed. vol. 1, p. 6.

Hon. H. Fletcher Moulton, for the Mertens Company. The company has been brought here to meet a motion which asks that its notice of appeal should be struck out, and it would probably have asked that the appeal should stand over till the end of the war. Now its right to appeal is admitted. It is not, however, to its interest to contend that the appeal should be heard during the war. It is preferred that it should stand over on the ground that the company cannot as an alien enemy take any step in the proceedings. *Albretcht* v. *Sussmann* (1813) 2 Ves. & B. 323, 13 Revised Rep. 110; *Robinson* v. *Continental Insurance Co. of Mannheim* [1915] 1 K. B. 155, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 31 Times L. R. 20, 59 Sol. Jo. 7. The Mertens Company are still in the position of defendants as they were in the court below; they can take the step of appealing, but the matter should stand over till after the war. [He also cited order lviii., r. 1.]

Sir J. A. Simon, A.-G. (**Branson** and **Nesbitt** with him), as *amicus curiæ*. In the first place, it is necessary to ascertain clearly what is meant by the term "alien enemy." For this purpose an "alien enemy" does not mean a subject of a state at war with this country, but a person of whatsoever nationality who is carrying on business in the enemy's country. The test is the hostile character of the person, and the question for consideration is where he is resident; so that a registered alien would not come within the meaning of the expression. See *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, at p. 505, where Lord Lindley says: "But when considering questions

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arising with an alien enemy, it is not the nationality of a person, but his place of business during war, that is important." See too *M'Connell* v. *Hector* (1802) 3 Bos. & P. 113, 6 Revised Rep. 724. Next comes the question, Is an alien enemy entitled [**864**] to sue in the courts of this country? The authorities show that an alien enemy carrying on business here *sub protectione regis* is entitled to sue. *Wells* v. *Williams* (1697) 1 Ld. Raym. 282, 1 Salk. 46, 1 Lutw. 34; but it is not enough that the subject of a hostile state is here at large, if the government does not know that he is here. *Boulton* v. *Dobree* (1808) 2 Campb. 163. A prisoner of war, however, may sue on a contract entered into as such prisoner. *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & P. 163, 2 Esp. 580, 4 Revised Rep. 772; *Maria* v. *Hall* (1800) 2 Bos. & P. 236; 1 Taunt. 33, note, 9 Revised Rep. 696. [He also cited *Sylvester's Case* (1702) 7 Mod. 150; *Brandon* v. *Nesbitt* (1794) 6 T. R. 23, 3 Revised Rep. 109; *The Hoop* (1799) 1 C. Rob. 196, 1 Eng. Prize Cas. 154; *Alciator* v. *Smith* (1812) 3 Campb. 245; *Le Bret* v. *Papillon* (1804) 4 East, 502, 7 Revised Rep. 618; *Alcinous* v. *Nigreu* (1854) 7 El. & Bl. 217, 24 L. J. Q. B. N. S. 19, 1 Jur. N. S. 16, 3 Week. Rep. 25; *Shepeler* v. *Durant* (1854) 14 C. B. 582; *The Möwe* [1915] P. 1, 84 L. J. Prob. N. S. 57, 112 L. T. N. S. 261.] A long line of authorities establishes two propositions,—that the test of disqualification as an alien enemy is not dependent merely on birth, and an alien enemy commorant in this country is entitled to be heard. Again, Is an alien enemy defendant entitled to defend? There is not to be found in the whole series of cases the slightest suggestion that, if notice can be given him of the proceedings taken against him, he cannot come and be heard. The difficulty arises from the practice; a plaintiff is not entitled to serve a writ out of the jurisdiction, nor is it possible to serve notice of the writ in the enemy's country. But the difficulty may be got over in cases where the alien enemy defendant has in this country a manager who can have notice given to him. For the proposition that an alien enemy who is sued in our courts can appear and defend, see Bacon, Abridgment, 7th ed. vol. 1, p. 183; *Albretcht* v. *Sussmann* (1813) 2 Ves. & B. 323, 13 Revised Rep. 110; *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 9 Revised Rep. 142; *Barrick* v. *Buba* (1857) 2 C. B. N. S. 563, 26 L. J. C. P. N. S. 280,

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5 Week. Rep. 665; Story's Equity Pleadings, ¶ 53; *McVeigh* v. *United States* (1870) 11 Wall. 259, 20 L. ed. 80.

The authorities show that, though an alien enemy cannot sue in the courts of this country, he can be sued. Sir Thomas Plumer, [**865**] V.C., so stated the law in *Albretcht* v. *Sussmann* (1813) 2 Ves. & B. 323, 13 Revised Rep. 110, where he referred to an unreported decision of the Court of Exchequer to the effect that the plea of an alien enemy would not hold to a bill of discovery in aid of a defense at law. Therefore the alien enemy succeeded in maintaining a bill of discovery in aid of his defense to an action at law. In *Daubigny* v. *Davallon* (1794) 2 Anstr. 462, it was held that a plea of alien enemy was a good plea to a bill of discovery in aid of an intended action at law by the alien enemy. That went upon the principle that the alien enemy cannot sue and therefore cannot have aid from the courts in support of an action by him. But he could have a bill of discovery as a shield to protect himself against an action brought against him. In Dicey on Parties to an Action, p. 2, it is stated as an exception to the rule that "all persons can sue and are liable to be sued in an action at law," that "felons, outlaws, and alien enemies cannot sue." In *Hastings* v. *Blake* (1596) Noy, 1, the principle is stated thus: "Men attaint or outlawed shall be put to answer in any action against them, because it is to their prejudice; but in an action brought by them they shall not be answered, because it is to their benefit." *Hall* v. *Trussell* (1603) F. Moore, 753, and *Ramsden* v. *Macdonald* (1748) 1 Wils. 217, show that such a person can be sued. In *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 9 Revised Rep. 142, an alien enemy was allowed to prove for a dividend in bankruptcy on a contract made before war, the dividend, however, not being paid over. That decision was founded on convenience so as to allow of the bankrupt's estate being distributed among the creditors. The proposition that an alien enemy cannot sue is also laid down in Co. Litt. 129b; Story's Equity Pleadings, 10th ed., §§ 51, 52; and, if sued, he ought to be admitted to defend and can appeal; *McVeigh* v. *United States* (1870) 11 Wall. 259, 20 L. ed. 80; *Robinson* v. *Continental Insurance Co. of Mannheim* [1915] 1 K. B. 155, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 31 Times L. R. 20, 59 Sol.

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Jo. 7. [He also referred to *Verney, otherwise Joyner's Case* (1565) 2 Dyer, 245b.]

There remains to be considered the effect of, and the proper construction of, paragraph (h) of art. 23 of chap. 1 of § 2 of the [866] Annexe to the Hague Convention of 1907.[1] The question is whether the Convention is to be construed by looking at paragraph (h) by itself, or whether that paragraph should be read in conjunction with the rest of the article. It is submitted that the latter construction is right, and that, having regard to the nature of the context in which it stands, it must be taken as limited to the proceedings of armies in the field; it is part of an article dealing with the limitation of the rights of belligerents on land to injure the enemy. [He referred to Pearce Higgins on The Hague Peace Conferences, p. 235; T. E. Holland in Law Quarterly Review (1912), vol. 28, at p. 94; Von Ullmann's Völkerrecht, 2d ed. at p. 474; Bonfils' Manuel de Droit International Public, 5th ed. at p. 651; Pitt Cobbett's Cases and Opinions on International Law, 3d ed. part II. pp. 85, 86; Bentwich on the Declaration of London; Westlake on International Law, 2d ed. part II.]

Cur. adv. vult.

The judgment of the court (Lord Reading, Ch. J., Lord Cozens-Hardy, M.R., Buckley, L.J., Kennedy, L.J.,[2] Swinfen Eady, Phillimore, and Pickford, L.JJ.) was read by

Lord Reading, Ch. J.: Before determining the respective merits of these three appeals it would best serve the public interest to examine the law relating to proceedings in the King's courts by or against alien enemies during a state of war, so that conclusions might be drawn which would be a guide to the solution of some of the present-day problems. In the first and second appeals the respondents had not been served and were not represented. Having regard, however, to the importance of the propositions of law to be discussed, the Attorney General, acting as

[1] The provisions of art. 23 will be found set out verbatim in the judgment, post, p. 566.

[2] Kennedy, L.J., died two days before the judgment was delivered, but had read and approved it before his death.

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amicus curiæ upon the invitation of the court, undertook the burden of presenting the law in all its aspects. We are much indebted to him for his valuable assistance.

The main questions to be considered are, first, the capacity of [867] alien enemies to sue in the King's courts; secondly, their liability to be sued; thirdly, their capacity to appeal to the appellate courts; and, generally, their right to appear and be heard in the King's courts.

There is much learning to be found in the books in reference to the enforcement of civil rights of alien enemies. Pronouncements on the subject were delivered by great judicial authorities during the Napoleonic Wars and again during the Crimean War, and in reference to incidents arising out of those wars. Happily, with the exception of the South African War, there has been hitherto no occasion in recent times for the courts to examine this branch of legal knowledge. It may therefore be useful to refer to some of the early authorities, although the main proposition of law have long been well settled.

It is necessary at the outset to keep clearly in mind the meaning of the term "alien enemy" when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality, that is, of a state at war with the King, and would not in any circumstances include a subject of a neutral state or of the British Crown, but that is not the sense in which the term is used in reference to civil rights. Ever since the great case of *The Hoop* (1799) 1 C. Rob. 196, the law has been firmly established as pronounced in the judgment of Lord Stowell (then Sir William Scott) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. (See also *Potts* v. *Bell,* per Lord Kenyon, C.J. (1800) 8 T. R. at p. 561, 2 Esp. 612, 5 Revised Rep. 452, 2 Eng. Rul. Cas. 654.) This branch of law was again considered as a result of the Crimean War, and Willes, J., in delivering the judgment of the Court of Queen's Bench in *Esposito* v. *Bowden* (1857) 7 El. & Bl. at p. 779, 24 Eng. Rul. Cas. 399, said: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of

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war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal." This law was founded in earlier [868] days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the state at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money, or goods, or other resources available to individuals in the enemy state. Trading with a British subject or the subject of a neutral state carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy state, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality, but the place of carrying on the business. *Wells* v. *Williams* (1697) 1 Ld. Raym. 282; *M'Connell* v. *Hector,* per Lord Alvanley, Ch. J. (1802) 3 Bos. & P. 113, 6 Revised Rep. 724; *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. at p. 505, per Lord Lindley. When considering the enforcement of civil rights a person may be treated as the subject of an enemy state, notwithstanding that he is in fact a subject of the British Crown or of a neutral state. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy state. As Lord Lindley said in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. at p. 505: "When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war, that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. Again the subject of a state at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses." Lord Lindley's statement was not intended to be, and is not, exhaustive. His Lord-

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ship, for the purposes of the appeal then before the [869] House of Lords, was considering the character of a trading corporation, and did not purport to deal with persons residing, but not carrying on business, in the enemy territory. Such a person is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy state. For the purpose of determining civil rights a British subject or the subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy, and is in the same position as a subject of hostile nationality resident in hostile territory. Professor Dicey, in his treatise on Parties to an Action, at p. 3, states the law accurately in the following proposition: "Under the term 'alien enemy' are included not only the subjects of any state at war with us, but also any British subjects or the subjects of any neutral state voluntarily residing in a hostile country."

In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown. Blackstone, 21st ed. vol. 1, chap. 10, p. 372. Indeed, under the ancient common law, "debts and goods found in this realm belonging to alien enemies belong to the King and may be seized by him." See Hale's Pleas of the Crown, vol. 1, p. 95. That the enemy's property was liable to confiscation is also shown by the privilege granted under chap. 30 of Magna Charta to merchant strangers coming into this realm, whereby the privilege was conceded to merchants of a land making war against the Sovereign and found in this realm, that they should be attached without harm of body or goods until it became known how English merchants were treated in the hostile state. If well treated, the enemy merchants were to be well treated here, so that confiscation of the enemy merchants' property would only occur by way of reprisal or retaliation. Whether the right of the Sovereign

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to [870] confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not (see *Wolff* v. *Oxholm* (1817) 6 Maule & S. 92, at p. 102, 18 Revised Rep. 313, per Lord Ellenborough), there can be no doubt about the existence of the right. See *Attorney-General* v. *Weeden* (1699) Parker, 267. Gibbs, Ch. J., in *Antoine* v. *Morshead* (1815) 6 Taunt. 237, 1 Marsh. 558, 16 Revised Rep. 610, affirmed the principle that the Crown during the war may lay hands on debts due to the alien enemy but, if it do not, then on the return of peace the rights of the contracting alien are restored and he may himself sue to recover the debts. See also Walford's Parties to Action (mentioned later herein), at p. 653, and the authorities there cited from 19 Edw. 4 to *Antoine* v. *Morshead* (1815) 6 Taunt. 237, 1 Marsh. 558, 16 Revised Rep. 610. The right of confiscation is only of importance to trace the history and foundation of our common law, since there is manifestly no question of exercising this right. The severity of the common-law rule was, however, in early days relaxed in favor of those who had the King's permission to come here. So long ago as the year 1454 it would follow from the reported observations of Ashton, J. (Year Book, 32 Hen. 6, 23(b) 5), that if an alien enemy came here under the King's license or a safe conduct he could maintain an action for trespass if any person took his goods from his house. Later, in 1697, in the case of *Wells* v. *Williams* (1697) 1 Ld. Raym. 282, 1 Lutw. 34, 1 Salk. 46, it was held that although an alien enemy came here in time of war and without a safe conduct yet, if he has continued to reside here by the King's leave and protection, he may be allowed to sue in the King's court, for such a right is consequent to the protection offered him. In Coke upon Littleton (19th ed. vol. 1, p. 129 (a)) it is stated that an alien enemy cannot maintain a real or personal action until both nations are at peace. An editorial note (A. D. 1832) adds that "on declaring war the King usually in the proclamation of war qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends in effect." The passage in Bacon's Abridgment (7th ed. vol. 1, p. 183) dealing with aliens is of similar effect: "If an alien enemy comes here [871] *sub salvo conductu* he may maintain an action; so

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if an alien army comes here in time of peace *per licentiam domini regis* as the French Protestants did, and lives here *sub protectione,* and a war afterwards happens between the two nations he may maintain an action, for suing is but a consequential right of protection; and therefore an alien enemy who is here in peace under protection may sue a bond; *aliter* of one commorant in his own country." This passage is mainly based upon *Wells* v. *Williams, supra,* and *Sylvester's Case* (1702) 7 Mod. 150. The decision in this last-mentioned case threw no doubt upon the principle of law, but held that in an action by an alien enemy, and when there was a plea in abatement of "alien enemy," it was incumbent on him to plead a replication that he was here under the protection of the Crown. Towards the end of the eighteenth century Lord Kenyon, Ch. J., in delivering the judgment of the Court of King's Bench in *Brandon* v. *Nesbitt* (1794) 6 T. R. 23, said that "an action will not lie either by or in favor of an alien enemy . . . " and that the court "had not found a single case in which the action had been supported in favor of an alien enemy. For though it was held in *Ricord* v. *Bettenham* (1765) 3 Burr. 1734, 1 W. Bl. 563, that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection." So clear a statement of the law was made by Lord Alvanley, Ch. J., in *M'Connell* v. *Hector* (1802) 3 Bos. & P. 113, that we quote it *in extenso:* "Most certainly every natural-born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct, but if he live in an enemy's country he forfeits that right. Though these persons may not have done that which would amount to treason, yet there is an hostile adherence and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile state, and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an English subject in [872] an English court of justice. The question is whether a man who resides under the allegiance and protection of an hostile state for all commercial purposes is not to be considered to all civil purposes as much an alien enemy as if he were born there? If we were to

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hold that he was not, we must contradict all the modern authorities upon this subject. That an Englishman from whom France derives all the benefit which can be derived from a natural-born subject of France should be entitled to more right than a native Frenchman would be a monstrous proposition. While the Englishman resides in the hostile country he is a subject of that country, and it has been held that he is entitled to all the privileges of a neutral country while resident in a neutral country." The later cases of *Boulton* v. *Dobree* (1808) 2 Campb. 163, and *Alciator* v. *Smith* (1812) 3 Campb. 245, whilst affirming the principle already stated, decided that the burden was upon the alien enemy to establish that he was within this realm by the license of the King, and, as the evidence was not sufficient in either case to discharge this burden, there was a nonsuit in both cases. During the Napoleonic Wars it was thus firmly established that an alien enemy, unless here by permission of the King, could not sue in the King's court. In a case arising out of the Crimean War, *Alcinous* v. *Nigreu* (1854) 4 El. & Bl. 217, 24 L. J. Q. B. N. S. 19, 1 Jur. N. S. 16, 3 Week. Rep. 25, the principle was again affirmed. The point arose on demurrer to the plea that the plaintiff was residing in this Kingdom without the license, safe conduct, or permission of the Sovereign. Lord Campbell, Ch. J., held that the court must take judicial notice that our Sovereign was at war with the empire of Russia, and was of opinion that, as the contract was entered into before the war, the plaintiff could enforce it when peace was restored, but that by the law of England, so long as hostilities prevailed, a Russian subject who was here without the permission, express or implied, of the Sovereign could not sue here.

In Walford's treatise on the Law Respecting Parties to Actions, published 1842, there is a chapter in vol. 1, p. 647, dealing with disabilities of civil origin which well repays close and diligent study. When treating of alien enemies the learned author at [**873**] p. 650 thus states the law: "Alien enemies are distinguishable according as they are under the King's special protection or not. If an alien enemy came here under a safe conduct, or is commorant here by the King's license and under his protection, he seems to stand in the same position as to the right of maintaining actions in our courts as an alien friend, a

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right of suing being an incidental right to protection,"—that is, he is no longer under the disability attaching to an alien enemy.

Whenever the capacity of an alien enemy to sue or proceed in our courts has come up for consideration, the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil courts of the realm. The case of *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 9 Revised Rep. 142, however, requires examination. In that case Lord Erskine, then Lord Chancellor, allowed alien enemies to enter a claim as creditors in a petition under a commission for bankruptcy on the ground that upon a return to peace the right to prove would survive, inasmuch as the debt arose from a contract made when the two nations were at peace. He came to the conclusion that it would be contrary to justice to confiscate the dividend, and as the right to recover was only suspended, that was not a reason why the fund available for the creditors should be divided among the other creditors without regard to the alien enemies' suspended rights. He therefore ordered that a claim be entered and the dividend of the alien enemy be reserved. The contention to which the Lord Chancellor there gave effect was that, in the administration of the fund in bankruptcy, the other creditors should not be permitted to take a larger dividend by the exclusion of the alien enemy. If the alien enemy could not take the dividend the Crown would be entitled to it. Under these circumstances the Lord Chancellor admitted, not a proof, but a claim. The result would be that there would be divided amongst the other creditors the differential sum remaining after reserving the dividend on the claim, and that, as his Lordship said, "upon the return of peace the right would survive and it would be contrary to justice to confiscate the dividend."

This differs from a case in which the alien enemy comes into court to prove the existence of the debt and claim judgment for [874] the amount. It must not, however, be regarded as an authority for the proposition that an alien enemy can present a petition to the court and be heard upon it. There was no argument before the Lord Chancellor as to whether such a petition could be presented by an alien enemy, and the point does not appear to have been considered. According to the report of the case, no interest was represented before his Lordship except that

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of the petitioner, but from the record, which we have had the opportunity of examining, it appears that the assignees in bankruptcy were also represented. The petitioners' argument was that there was a valid debt, and that therefore a sufficient amount should be reserved from the fund to be distributed. The Lord Chancellor, having expressed the opinion that the contract was valid and the debt due, had nevertheless become aware that the alien enemy would be entitled on restoration of peace to payment of a dividend upon his debt, and his Lordship thought the right and convenient course was to enter the claim and reserve the amount until after the war. It is as if a trustee in bankruptcy, about to distribute funds arising from the debtor's estate to the creditors, received notice of a claim by an alien enemy, and, having satisfied himself as to its validity, kept in his hands sufficient to pay a dividend on the debt after the conclusion of the war.

The latest adjudication upon the alien enemy's right to sue is *Prncess Thurn and Taxis* v. *Moffitt* (1914) 31 Times L. R. 24, [1915] 1 Ch. 58, [1914] W. N. 379, 59 Sol. Jo. 26, where Sargant, J., held that the subject on an enemy state who was registered under the aliens restriction act 1914, as an alien and the subject of an enemy state is entitled to sue in the King's courts. This decision is, in our opinion, clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country, and has been allowed thereafter to remain here. He is *sub protectione domini regis.*

Having stated the common law of England in regard to the question of the alien enemy's right to sue in our courts of law, we have now to consider whether The Hague Convention of 1907 upon the Laws and Customs of War on Land, article 23 (h) of chapter 1 of § 2 of the Annex entitled, "Regulations [875] Respecting the Laws and Customs of War on Land," has any bearing upon the questions we have to determine. The heading of that section is, "Of Hostilities." Section 3 is headed, "Military Authority over the Territory of a Hostile State."

Chapter 1 of § 2 is entitled, "The Means of Injuring the Enemy; Sieges and Bombardments." The articles in it are numbered from 22 to 28. Articles 22 and 23 are as follows:—

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"Article 22.

"Belligerents have not an unlimited right as to the choice of means of injuring the enemy.

"Article 23.

"In addition to the prohibitions provided by special conventions it is particularly forbidden

"(a) To employ poison or poisoned weapons;

"(b) To kill or wound by treachery individuals belonging to the hostile nation or army;

"(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;

"(d) To declare that no quarter will be given;

"(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;

"(f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as of the distinctive signs of the Geneva Convention;

"(g) To destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of war;

"(h) To declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings.

"A belligerent is likewise forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country even if they were in the service of the belligerent before the commencement of the war."

[876] The remaining articles refer to ruses of war, bombardments, sieges, and assaults.

The important paragraph is 23 (h): "To declare abolished, suspended, or inadmissible the right of subjects of the hostile party to institute legal proceedings."

It is desirable to give it also in French: De déclarer éteints, suspendus, ou non recevables en justice les droits et actions des nationaux de la partie adverse."

This paragraph (h), in a form which was not substantially

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different, was originally introduced in one of the committees of The Hague Conference by General von Gündell, a German delegate, and Herr Göppert, another German delegate, undoubtedly stated in reference to it that the intention of the proposed clause was to prohibit all legislative measures which in time of war would place the subject of an enemy state in the position of inability to enforce the execution of a contract by recourse to the tribunals of the state in regard to which he is an alien enemy. The text of the paragraph must of course be interpreted by us as it now stands in the ratified convention, and the intention of its proposer is immaterial, but it is only fair to add that the paragraph as originally proposed did not contain the words *en justice,* and, instead of the words, *les droits et actions des nationaux,* the words were, *les réclamations privées des ressortissants.* These changes of language appear, so far as they go, rather to be in accord with Herr Göppert's statement of the object of the proposal. They were, as we understand, made in the course of the drafting of the Annex without discussion or debate taking place in regard to them, and the paragraph as it now stands was submitted for the final approval of the conference without any suggestion of their being in any way material.

The meaning and force of the paragraph have been subjected to a considerable discussion by learned writers upon international law in this country, in America, and on the Continent, and the Attorney General, in the course of his argument in this case, both by reference and by citation, placed us in possession of the most valuable of the opinions of those writers. It would, in our view, serve no useful purpose to attempt here any elaborate [877] examination of these opinions. Suffice it to say that the substantial question being whether the operation of this paragraph is or is not to abrogate the old rule (not peculiar to English law, though it has been more prominent in England than elsewhere) that an alien enemy's rights of action are suspended during the war, jurists of eminence have expressed widely divergent views upon the point, and this court has given to those views its very careful consideration. We are all clearly of the opinion that the paragraph in question cannot be treated as effecting any such abrogation.

If we look, in the first place, at the terms of the paragraph

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itself and apart from its collocation and context, we find that what it forbids is, as also in paragraph (d), a "declaration,"—"It is forbidden to declare." This has no application to a country in which, as in England, there is no room for a declaration. By the existing law of the country the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of the outbreak of war any alien enemy may possess. It is interesting to observe that Dr. Sieveking, an eminent German jurist, whilst holding that the paragraph was intended to have all the effect foreshadowed by Herr Göppert, is of opinion that, as to England at any rate, it is ineffectual because it only prevents some executive authority from declaring that rights of action are suspended, extinguished, or inadmissible. He rightly points out that no such declaration is required in English law for the reason already given.

Extending our view from the paragraph itself to the immediate context, we find that it is included in a group of paragraphs forming article 23, every other of which relates solely to the conduct of a military force and its commanders in a campaign, and not at all to the administration of the law respecting alien enemies at home; that the chapter of which the article forms part is entitled, "Means of Injuring the Enemy; Sieges and Bombardments," and that the section of the Annex to which the chapter belongs bears the general heading, "Of Hostilities." Extending our view still further to the convention itself, we find the declaration which governs the whole Annex and controls its application in article 1: "The contracting powers will issue [878] to their armed land forces instructions which shall be in conformity with the 'regulations respecting the laws and customs of war on land' annexed to the present convention."

It is impossible to suppose that this means (as it must do if the effect of the paragraph (h) is to abrogate the law existing hitherto in England and to give an alien enemy the position of *a persona standi in judicio* in English courts of law) that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French, commanding our land forces in the field, forbidding him to "declare" that the rights of alien enemies—Germans, Austrians, or Turks—to institute legal proceedings in the High Court of Justice in London are

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suspended or inadmissible. And yet this absurdity seems necessarily to follow from the scheme of the convention as applied to paragraph (h) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law, which hitherto has not given to an alien enemy the position of *a persona standi in judicio.*

Our view is that article 23 (h), read with the governing article 1 of the convention, has a very different and very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights. For example, if the commander in chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have a right to sue in the courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this paragraph was intended to make particularly forbidden by the solemn compact between all the states which ratified The Hague Convention of 1907. According to eminent jurists the occupying military power is forbidden as a general rule to vary or suspend laws affecting [879] property and private personal relations. See Hall's International Law, 6th ed. p. 465. This article 23 (h) has now enacted that, whatever else the occupying military power may order in the territory of the enemy which it dominates, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and the chapter of the Annex to the convention which it occupies.

There are two matters brought before us by the learned Attorney General in connection with the interpretation of article

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23 (h) which, in our opinion, ought not to be left unnoticed. The first of these is the letter addressed on March 27, 1911, by our foreign office to Professor Oppenheim, of Cambridge, in answer to an inquiry made by him on the preceding February 28 in reference to the views which had been expressed in regard to the paragraph by some foreign jurists. The reply of the foreigu office was published. It contains a powerfully reasoned exposition of the view that this paragraph has no concern with the municipal law, but relates to the conduct of those who are in command of an army in occupation of the territory of an enemy.

The second matter is an incident of a diplomatic character. On the eve of the outbreak of the present war the German ambassador in London addressed a communication to our foreign office to this effect: "In view of the rule of English law the German government will suspend the enforcement of any British demands against Germans unless the imperial government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No arrangement was arrived at. We refer to these two incidents, not because either of them can affect our judgment on the question of the interpretation of article 23 (h), but because it is right that it should be made quite clear to every one that as early as the spring of 1911 the view of the British government as to its true interpretation was made public to the [880] world, and that the situation was perfectly well understood by the German government.

It is to be regretted that the paragraph should be so drawn as to give rise to controversy as to its proper interpretation, but, for the reasons given, we think the paragraph has not the extended meaning claimed for it, and does not affect the ancient rule of the English common law that an alien enemy, unless with special license or authorization of the Crown, has no right to sue in our courts during the war.

Having now explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's courts is suspended during the progress of hostilities and until after peace is restored (see also *Flindt* v. *Waters* (1812) 15 East, 260, 13 Revised Rep. 457), the next point to consider

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is whether he is liable to be sued in the King's courts during the war. To allow an alien enemy to sue or proceed during war in the civil courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. Prima facie there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache, J., in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* [1915] 1 K. B. 155, at p. 159, "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject, and to favor an alien enemy, and to defeat the object and reason of the suspensory rule." In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him [881] during war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but sometimes it is the subject of express reference and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. Bacon's Abridgment, 7th ed. vol. 1, p. 183, asserts this liability of the alien enemy without doubt or hesitation. "The plea of 'alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery, for as an alien enemy may be sued at law and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery." This is an important passage in other respects also, and in our judgment it is a correct statement of the law. Walford, in his valuable work above mentioned on

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Parties to Actions, at p. 656 says: "With respect to the liabilities of aliens, whatever be their description, whether friends or enemies, whether with or without protection, they seem to be open to be sued just the same as native subjects, there being nothing in their character either originally to incapacitate them from contracting an obligation, or committing a civil injury, or to shelter them in any action brought against them in consequence." Sec. 53 of Story's Commentaries on Equity Pleading is of similar effect: "An exception might perhaps be allowed where the alien enemy is the defendant in a suit at law in the country where he brings the bill for discovery; since it may be the only effectual means on his part to establish a perfect defense to the suit at law." This passage shows that in the opinion of the learned author an alien enemy might be defendant in a suit. In Lush's Practice (1865, 3d ed.) vol. 1, p. 6, it is stated that outlaws, aliens, enemies, felons, etc., are all liable to be sued. Professor Dicey in his work on Parties to Actions has a passage to the same effect. Walford, at p. 666 of the treatise already mentioned, also expresses the opinion that a person attainted, outlawed, or excommunicated is open to be sued like an ordinary person, as he has already observed, like an alien friend or enemy.

[882] The Supreme Court of the United States had to consider the position of an alien enemy defendant in *McVeigh* v. *United States* (1870) 11 Wall. 259, 20 L. ed. 80. The United States under a statute then in force filed a libel of information in the district court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground that he was "a resident of the city of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The Attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the court granted the motion, and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. Swayne, J., in delivering the judgment of the court, said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there, he could defend

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there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. . . . Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense." The learned judge relied upon the above-mentioned passage in Bacon's Abridgment as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the district court and of the circuit court.

Although there is no case in English law which has directly decided that an alien enemy can be sued in our courts, until the recent decision of Bailhache, J., it is instructive to glance at cases dealing with forfeiture of civil rights resulting from some act of misconduct. The traitor, the felon, the outlaw, and the excommunicated person were under civil disabilities. They were held by their misconduct to have wiped out and obliterated the original [883] traces of their character as citizens (see Walford, p. 647). Such misconduct, generally speaking, carried the same denial of the rights to sue in the courts as attached to an alien enemy. In Noy's Reports (Noy was Attorney General to Charles I.) this judicial observation occurs in *Hastings* v. *Blake* (1596) Noy, 1: "Men attaint or outlawed shall be put to answer in any action against them because it is to their prejudice: but in an action brought by them they shall not be answered because it is to their benefit." In *Ramsden* v. *Macdonald* (1748) 1 Wils. 217, Lee, Ch. J., said: "There is no doubt but a person attainted may be sued." These are not direct authorities to support the proposition now under discussion with reference to alien enemies, but they are instances to show that there is no reason in principle why a person attainted or outlawed should not be sued. These are cases arising, it is true, out of misconduct, but they involved the parties in the same disability to sue as attached to an alien enemy, and we are at a loss to conceive why the same liability to be sued should not equally apply to him.

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The real difficulty that arises in seeking to enforce a right against an alien enemy is that of fixing him with proper notice of the suit and the proceedings in the action, with which we will deal later.

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defense, and may take all such steps as may be deemed necessary for the proper presentment of his defense. If he is brought at the suit of a party before a court of justice, he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice, and would be quite contrary to the basic principles guiding the King's courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceed against him, the appellate courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate court by giving the notice of appeal, which is the first necessary step to bring the case before that court; but he is entitled to have his case decided according to law, and if the judge in one [**884**] of the King's courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in *McVeigh* v. *United States, supra,* in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the district and circuit courts and succeeded in reversing the judgments of those courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate courts of the King?

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We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his courts. He is the "actor" throughout. He is not brought to the courts at the suit of another, it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace.

Having now dealt with general principles, we proceed to consider their application to the three appeals before us. The plaintiff in the first appeal issued a writ against one Philip [885] Freudenberg (trading as Hermann Gerson) to recover a quarter's rent due on September 29, 1914, under a lease made in 1903 of certain premises situate in Prince's street, Hanover Square, London. The defendant resides and carries on business as a mantle manufacturer in Berlin in the Empire of Germany, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the affidavit of the plaintiff, a quantity of stock was usually kept on the premises, but immediately before September 29 the whole of the stock, fixtures, and fittings was removed from the premises. On September 28 the keys of the premises were sent to the plaintiff by Barnes, which the plaintiff intimated would be held at the disposal of Barnes as the agent of the defendant. The plaintiff having issued his writ applied to Scrutton, J., for directions as to the manner of serving it upon the defendant in Berlin. The learned judge gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ in Berlin. In view of the difficulty of serving the notice of writ on the defendant, Mr. Fitch, on behalf of the plaintiff, asked this court to make an order for substituted service of the notice of writ

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by allowing service of it upon Barnes or otherwise as the court might direct.

In the second appeal the plaintiffs Kreglinger are skin and hide merchants carrying on business in London and at Antwerp. Before the outbreak of war they had entered into contracts for the sale of cargoes of hides from Australia to the firm of S. Samuel & Rosenfeld, carrying on business in London. Before the outbreak of war the firm of S. Samuel & Rosenfeld intimated that they did not intend to carry out the contracts. After the outbreak of war a writ was issued and the plaintiffs claimed to have effected proper service of it upon the firm by leaving it upon one Bonome, a person who appeared to be in control or management of the business here. (See order xlviiia, r. 3.) Bonome entered a conditional appearance and applied to set aside the service. Scrutton, J., set it aside on the ground that one Alfred Cohen, who resided at Hamburg, was the sole proprietor of the business of S. Samuel & Rosenfeld, and therefore order xlviiia, r. 3, did not apply, as there were not two or [886] more partners carrying on business within the jurisdiction. An unsuccessful attempt was made to establish that Bonome was a partner in the firm. Evidence was taken before the master, and it appeared that Bonome was not a partner, but was the manager of the business in London for Alfred Cohen with full authority to act in all matters in respect of the said business. The plaintiffs only knew Bonome and transacted all their business with the firm with him. Scrutton, J., in the plaintiffs' application gave leave to issue a concurrent writ against Alfred Cohen with liberty to serve notice of the writ at Hamburg in Germany, but refused leave to make substituted service of the notice of writ by serving it on Bonome, thinking himself bound to refuse by reason of the decision in *Wilding* v. *Bean* [1891] 1 Q. B. 100, 60 L. J. Q. B. N. S. 10, 64 L. T. N. S. 41, 39 Week. Rep. 40. The plaintiffs appeal from this refusal and ask this court, in view of the circumstances and of the difficulty, if not impossibility as they suggest, of effecting service upon Alfred Cohen during the war, to permit them to make the service upon Bonome, inasmuch as he appears to be the person in charge of the defendants' interests in this country. We are at this moment engaged only in determining questions as to the proper mode of service,

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and are expressing no opinion, except in this connection, as to the position of Bonome.

The courts having decided that the alien enemy can be sued, have to consider how effective notice of the proceedings in the courts of this country can be served on the alien enemy in the enemy country. Diplomatic relations between the two nations have been broken off, and a serious question might have arisen whether in these circumstances order xi., r. 8, of the rules of the Supreme Court was applicable. Before the outbreak of war Germany was, by order of the Lord Chancellor, a country to which this rule applied, and, so long as that order stood, the procedure to be adopted for service in Germany was regulated by that rule. That order has, however, been revoked by the Lord Chancellor, and it therefore becomes unnecessary further to consider whether the rule that this procedure therein prescribed "shall be adopted" could be held applicable during a war between us and the country in which the service was to be effected. Unless an order for substituted service in this country of a notice of writ for [887] service out of the jurisdiction can be made in a proper case, great hardship may be inflicted upon persons who are subjects of and resident in this country who have given credit or entered into contractual relations with or have claims against persons who are now alien enemies, to the manifest advantage of the alien enemies and disadvantage of British subjects and subjects of other states who wish to sue in this country. This court whilst bearing this consideration in mind must also take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. It is obvious that in all cases against the alien enemy the plaintiff will seek, if possible, an order to make substituted service in this country. It is desirable therefore to consider in some detail—

(1) In what circumstances substituted service can be ordered; and

(2) Whether substituted service within the jurisdiction can be ordered of a notice of writ for service without the jurisdiction.

The general rule is that an order for substituted service of writ of summons within the jurisdiction cannot be made in any case in which, at the time of the issue of the writ, there could

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not be at law a good personal service of the writ because the defendant is not within the jurisdiction.

"If the writ had not been issued until the defendant had left the country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction." Per Collins, L.J., in *Jay* v. *Budd* [1898] 1 Q. B. at p. 19.

"There cannot be a good substituted service where personal service would not be legally possible." Per Lord Esher, M.R., and Lopes, L.J., in *Worcester City and County Banking Co.* v. *Firbank* [1894] 1 Q. B. at pp. 788, 790. "There cannot be substituted service on a person on whom personal service could not be validly effected." Per Davey, L.J., Id. at p. 792. See also *Fry* v. *Moore* (1889) 23 Q. B. D. 395, 58 L. J. Q. B. N. S. 382, 61 L. T. N. S. 545, 37 Week. Rep. 565; *In re Urquhart* (1890) 24 Q. B. D. 723, 59 L. J. Q. B. N. S. 364, 38 Week. Rep. 612, 7 Morrell, 94; *Wilding* v. *Bean* [1891] 1 Q. B. 100, 60 L. J. Q. B. N. S. 10, 64 L. T. N. S. 41, 39 Week. Rep. 40, [888] especially per Lord Esher, M.R. ([1891] 1 Q. B. at foot of p. 101). The rule was also acted upon by Farwell, J., in *Western, &c., Building Society* v. *Rucklidge* (Unreported, but see the report of that case before Swinfen Eady, J. [1905] 2 Ch. 472, 74 L. J. Ch. N. S. 751, 54 Week. Rep. 62, 93 L. T. N. S. 664). This general rule is not applied where the court is satisfied that the defendant went outside the jurisdiction before the issue of the writ in order to evade the service of the writ within it. See *In re Urquhart*, 24 Q. B. D. 723, 59 L. J. Q. B. N. S. 364, 38 Week. Rep. 612, 7 Morrell, 94; *Watt* v. *Barnett* (1878) 3 Q. B. D. 183, C. A. Id. 363, 38 L. T. N. S. 903, 26 Week. Rep. 745. If the defendant went out of the jurisdiction after the issue of the writ, although not for the purpose of evading service, substituted service may be allowed if the court is satisfied that the issue of the writ came to his knowledge before he went outside the jurisdiction, and special circumstances show that such substituted service would be just within order ix., r. 2. See *Jay* v. *Budd* [1898] 1 Q. B. 12, 66 L. J. Q. B. N. S. 863, 77 L. T. N. S. 335, 46 Week. Rep. 34, per Lord Halsbury, L.C., and Collins, L.J., Rigby, L.J., dissenting.

In order that substituted service may be permitted, it must

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be clearly shown that the plaintiff is in fact unable to effect personal service, and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. The court may then make such order as may seem just. Order ix., r. 2. The terms of this rule are of very wide application, and give a very wide discretion which we are not inclined to limit. In the case of a writ properly issued under one of the heads of order xi., r. 1, for service out of the jurisdiction, substituted service either within or without the jurisdiction may be permitted in special circumstances, as, *e.g.*, that the defendant is evading personal service of such writ, and that the proposed form of substituted service will be effectual in bringing the writ to the defendant's knowledge. *Ford* v. *Shephard* (1895) 34 Week. Rep. 63, 53 L. T. N. S. 564; *Western, &c., Building Society* v. *Rucklidge* [1905] 2 Ch. 472, 74 L. J. Ch. N. S. 751, 54 Week. Rep. 62, 93 L. T. N. S. 664. In the case of a notice in lieu of writ to be served on a foreigner out of the jurisdiction on order properly obtained under order xi., r. 1, there is no reason why substituted service of that notice should not be permitted in similar circumstances to those in which it is permitted in the case of a writ for service [889] out of the jurisdiction. As to substituted service of such a notice, order xi., r. 7, and order ix., r. 2, give power to order it. Certainly under order xi., rr. 8 (4.) and 8 (5.), it is contemplated that this may be done, for it prescribes the method of doing it, and *Ditton* v. *Bornemann* (1886) 3 Times L. R. 3, (a decision on the practice before the introduction of rr. 8 and 8 (a)) favors the view that the substitued service of a notice of a writ may be allowed. Lord Coleridge, Ch.J., and Bowen, L.J., sitting as a divisional court, made the order, which had been refused by the judge in chambers, that service of the notice of the writ should be made by registered letter to Germany to the trustee of the estate of the defendant, whose affairs were in compulsory liquidation in Germany, and also to the defendant's wife, and that defendant should have a month to appear after letter would arrive. The judge in chambers before whom the application is made for substituted service of a writ for service out of the jurisdiction or of a notice of such a writ ought to be careful before acceding to the application—

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(a) To satisfy himself that there exists a practical impossibility of actual service, as otherwise, inasmuch as there is always a certain amount of difficulty and delay in effecting service out of the jurisdiction under order xi., a plaintiff will always seek to obtain an order for substituted service, with the serious risk that the defendant may never have notice of the proceedings and judgment in default of appearance may be given against him unjustly;

(b) To satisfy himself for the same reason that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.

Our English procedure has hitherto been laudably superior to the Continental in not permitting that which may be called "constructive service," such as, *e.g.*, by public notices or advertisements, whereby a defendant may be condemned unheard because he has had no knowledge of the proceedings against him. In *Porter* v. *Freudenberg* the writ was issued for service [890] within the jurisdiction, the defendant being abroad at the time of the issue of the writ. There could therefore be no order for substituted service of that writ. Leave having now been given to issue a concurrent writ and to serve notice out of the jurisdiction, that difficulty is removed. The proper order to make in the circumstances in this case and also in *Kreglinger* v. *S. Samuel & Rosenfeld* is to give the leave to make substituted service and to refer both cases back to chambers for directions as to the mode of effecting it. Upon the materials now before us we think service of the notice should be effected in the one case by substituted service upon Barnes and in the other upon Bonome, and such further terms should be imposed in chambers upon the plaintiff as to advertisement or other means of communication and as to the period to be given to the defendant for appearance as may seem proper.

The rule committee may think it necessary now to consider whether further rules should be made to meet some of the present difficulties of service of notice of proceedings in our courts against an alien enemy. It should, however, be borne in mind that there is little, if any, value in obtaining judgment in our

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courts in default of appearance of the defendant resident in an enemy state, unless there is property in this country which can be reached in execution of the judgment. Where there is property in this country there is frequently some person upon whom an order for substituted service could be made, supplemented by other provisions as to giving notice to the defendant of the proceedings to which we have already called attention. In each of these appeals the order of Scrutton, J., will be varied in accordance with the views we have expressed, and the matters will be referred back to chambers to be there dealt with.

In the third appeal the matter came before us on a motion to set aside the appeal on the ground that the appellants were alien enemies. Soldan & Company, Limited, an English company, presented a petition for revocation of a patent granted to a German subject resident in Germany, of which patent a German company were the owners. The petition was heard by Warrington, J., who made an order on July 28, 1914, for revocation of the patent, but, if notice of appeal was given on or before August 28, [**891**] 1914, the operation of the order was to be suspended until the hearing of the appeal. Notice of appeal was given on August 28. War was declared between his Majesty the King and the German Emperor on August 4. Therefore at the date of giving the notice of appeal the said appellants were alien enemies, and the notice of the motion now before the court was launched to set aside the notice of appeal upon that ground. At the hearing before us Mr. Walter, on behalf of the petitioners, admitted that he could not succeed on the motion, and did not now apply to set aside the appeal, but he did ask the court to express its opinion that the hearing of the appeal was not suspended and that it could be heard during the war. The position was peculiar, inasmuch as Mr. Moulton, on behalf of the appellants, did not dispute that his clients were alien enemies, but insisted, in the interest of his clients, not upon their right to be heard, but that their appeal could not be heard until after the restoration of peace. If we acceded to that view and the order for suspension of the revocation of the patent stood as made by Warrington, J., alien enemies who are the owners of the patent would be in a distinctly advantageous position so long as the war lasted. It is not surprising, therefore, that Mr. Walter, on

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behalf of the petitioners, insisted that the appeal of the alien enemy could be heard, and asked this court to give an intimation to that effect. The appellants were the respondents to a petition. They were brought to the court at the instance of another because they were the owners of the patent rights. The alien enemy appellants were not the "actors" in the proceedings; these were initiated by the petitioners, and notice was served upon the appellants for revocation of the patent rights they had acquired.

The appellants must be regarded for this purpose as being in the same position as a defendant in a suit who appeals from a judgment given against him. In accordance with the opinion we have already expressed, the appellants were therefore entitled not only to appear and be heard on this motion, but to have their appeal heard in the ordinary course notwithstanding the war. We cannot accede to their contention that the hearing of the appeal must be suspended during the war. We take a more favorable view of the appellants' rights in this respect than the [892] appellants, and we agree with Mr. Walter's contention that the appeal must take and keep its place in the ordinary way in the list. It should be distinctly understood that nothing that we have said is intended in any degree to interfere with or limit the discretion of the court before which the appeal will come for hearing to make any such order for postponement or otherwise of this appeal as it may think fit. The appellants can make any such application based upon the difficulties arising from the war as they may deem right and necessary, and the court will deal with it upon the facts then presented in the usual way.

The motion must be dismissed, but, in view of the peculiar circumstances, without costs.

The late Kennedy, L.J., had approved this judgment before his death.

This is the judgment of the court.

Order varied in Porter *v.* Freudenberg and in Kreglinger *v.* S. Samuel & Rosenfeld.
Motion dismissed in In re Merten's Patents.

Solicitors for plaintiff in Porter v. Freudenberg: *W. W. Young, Son & Ward.*

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Solicitors for plaintiffs in Kreglinger v. S. Samuel & Rosenfeld: *Alfred Double & Sons.*

Solicitors for petitioners in In re Merten's Patents: *Bower, Cotton, & Bower.*

Solicitors for respondents in In re Merten's Patents: *White & Leonard.*

Note.—Alien enemies as litigants.

I. As plaintiffs or claimants.
a. In general, 583.
b. Where enemy does not reside in his own country, 587.
c. Suits growing out of transactions permitted by the government, 588.
d. Effect of war on suit previously instituted, judgment recovered, or appeal pending, 589.
e. Nature and form of plea, 590.
II. As parties defendant.
a. In general, 591.
b. Sufficiency of constructive service, 594.
c. Attachment proceedings, 597.
d. Enforcement of mortgage, deed of trust, or other lien, 597.
III. Right to habeas corpus, 600.

I. As plaintiffs or claimants.

a. In general.

It is a rule of universal acceptance, though subject to certain exceptions presently to be discussed, that an enemy can neither institute an action during the continuance of the war (*Brandon* v. *Nesbitt* (1794) 6 T. R. 23, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649; *Alcinous* v. *Nigreu* (1854) 4 El. & Bl. 217, 24 L. J. Q. B. N. S. 19, 1 Jur. N. S. 16, 3 Week. Rep. 25; *Netherlands South African R. Co.* v. *Fisher* (1901) 18 Times L. R. 116; *Robinson* v. *Continental Ins. Co.* [1915] 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7; *Bassi* v. *Sullivan* (1914) 32 Ont. L. Rep. 14; *Dumenko* v. *Swift Canadian Co.* (1914) 32 Ont. L. Rep. 87; *Dangler* v. *Hollinger Gold Mines* (1915) 34 Ont. L. Rep. 78; *Wilcox* v. *Henry* (1782) 1 Dall. 69, 1 L. ed. 41; *Mumford* v. *Mumford* (1812) 1 Gall. 366, Fed. Cas. No. 9,918; *Johnson* v. *13 Bales* (1814) 2 Paine, 639, Fed. Cas. No. 7,415; *Crawford* v. *The William Penn* (1815) Pet. C. C. 106, Fed. Cas. No. 3,372; *Elgee* v. *Lovell* (1865) Woolw. 102, Fed. Cas. No. 4,344; *Chappelle* v. *Olney*

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(1870) 1 Sawy. 401, Fed. Cas. No. 2,613; *Russ* v. *Mitchell* (1864) 11 Fla. 80; *Seymour* v. *Bailey* (1872) 66 Ill. 288; *Perkins* v. *Rogers* (1871) 35 Ind. 124, 9 Am. Rep. 639; *Dorsey* v. *Kyle* (1869) 30 Md. 512, 96 Am. Dec. 617; *Dorsey* v. *Dorsey* (1869) 30 Md. 522, 96 Am. Dec. 633; *Dorsey* v. *Thompson* (1872) 37 Md. 25; *Levine* v. *Taylor* (1815) 12 Mass. 8; *De Jarnette* v. *De Giverville* (1874) 56 Mo. 440; *Sanderson* v. *Morgan* (1868) 39 N. Y. 231, affirming 25 How. Pr. 144; *Burnside* v. *Matthews* (1873) 54 N. Y. 78; *Jackson ex dem. Johnston* v. *Decker* (1814) 11 Johns. 418; *Griswold* v. *Waddington* (1818) 15 Johns. 57; *Bonneau* v. *Dinsmore* (1862) 23 How. Pr. 397; *Cruden* v. *Neale* (1796) 2 N. C. (1 Hayw.) 338; *Bishop* v. *Jones* (1866) 28 Tex. 294; *Peerce* v. *Carskadon* (1870) 4 W. Va. 234, 6 Am. Rep. 281; *Haymond* v. *Camden* (1883) 22 W. Va. 180), nor prosecute an action instituted before its commencement (*Le Bret* v. *Papillon* (1804) 4 East, 502, 7 Revised Rep. 618; *Luczycki* v. *Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. R. 549; *Bell* v. *Chapman* (1813) 10 Johns. 183; *Robinson* v. *Continental Ins. Co.* [1915] 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7; *Currie* v. *The Josiah Harthorn* (1862) Fed. Cas. No. 3,491a).

The same rule applies to the residents of a state in insurrection against the general government. *Bonneau* v. *Dinsmore* (1862) 23 How. Pr. 397; *Sanderson* v. *Morgan* (1868) 39 N. Y. 231; *United States* v. *100 Barrels Cement* (1862) Fed. Cas. No. 15,945; and see also generally other cases growing out of the Civil War.

Such disability is temporary in its nature, and personal, and founded upon reason and policy and, in a great measure, upon necessity. *De Jarnett* v. *De Giverville* (1874) 56 Mo. 440.

In *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & P. 163, it was said by Eyre, Ch. J.: "I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw."

But in *Viola* v. *Mackenzie, M. & Co.* (1915) — Quebec, —, 24 D. L. R. 208, it is said that the restriction of the right to sue does not result from the incapacity of the foreigner, but from the fact that the enemy country will profit by executing a judgment in his favor.

"By the policy of the law, alien enemies shall not be admitted to actions to recover effects which may be carried out of the Kingdom to weaken ourselves and enrich the enemy." 1 Bacon, Abr. "Aliens," D.

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The disability of an alien enemy to sue is so extended as to prevent him from gaining any advantage for himself and his country; and therefore he is not only disabled from suing for the purpose of procuring any immediate relief, but he is not allowed to obtain testimony by a bill of discovery in equity so as thereby to lay a foundation for obtaining relief elsewhere. *Hepburn's Case* (1830) 3 Bland Ch. 95; *Daubigny* v. *Davallon* (1794) 2 Austr. 463.

But where sued he may have a discovery for the purpose of conducting his defense, just as he would be allowed process to compel the attendance of his witnesses. *Albretcht* v. *Sussmann* (1813) 2 Ves. & B. 323, 13 Revised Rep. 110.

The disability attaching to the character of an alien enemy is not affected by the circumstance that he sustains the character of consul of a neutral state. *Ibid.*

The right to recover a debt being only suspended during and not extinguished by the war, an alien enemy may make a claim in a bankruptcy proceeding, though dividends thereon will be withheld until the conclusion of peace. *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 9 Revised Rep. 142. But an alien enemy resident in the enemy country cannot be heard during the war to complain of the rejection of a claim filed by him against a bankrupt estate. *Re Wilson* (1915) 84 L. J. K. B. N. S. 1893.

An alien enemy cannot appear as a claimant of libeled property. *Johnson* v. *13 Bales* (1814) 2 Paine, 639, Fed. Cas. No. 7,415; *United States* v. *1756 Shares* (1863) Fed. Cas. No. 15,960a; *United States* v. *The Isaac Hammett* (1862) Fed. Cas. No. 15,446.

A prize court, though a court of nations, is so far a British court that an alien enemy cannot sue therein unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. Per Sir Wm. Scott in *The Hoop* (1799) 1 C. Rob. 196.

But under the present practice of the English prize courts any alien enemy claiming any protection, privilege, or relief under a convention of the Hague Peace Conference, is entitled to appear as a claimant and argue his claim before the court. *The Möwe* (1914) 84 L. J. Prob. N. S. 57, [1915] P. 1, 112 L. T. N. S. 261.

It has been held that an action under the Ontario fatal accidents act (Rev. Stat. [Ont.] 1914, chap. 151) cannot be maintained by the administrator of a decedent, where the persons for whose benefit the action is given are alien enemies. *Dangler* v. *Hollinger Gold Mines* (1915) 34 Ont. L. Rep. 78.

That one of the plaintiffs who is a merely nominal party, and who could not control the suit nor collect the judgment, is a public enemy, is no ground for dismissing the petition of the beneficial

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plaintiff, who is not an enemy. *Hoskins* v. *Gentry* (1865) 2 Duv. 285; *Mercedes Daimler Motor Co.* v. *Mandslay Motor Co.* (1915) 31 Times L. R. 178, 32 R. P. C. 149, [1915] W. N. 54.

And where it is pleaded in abatement that one of the plaintiffs is an alien enemy, the other plaintiff may move to amend his writ by striking out the name of his coplaintiff. *Arnold* v. *Sergeant* (1783) 1 Root, 86.

It has been held, on the one hand, that an alien enemy cannot bring suit in the name of a trustee not an alien, as the public policy which forbids that the property sued for should be carried out of the country to enrich the enemy would be violated equally in the one case as in the other (*Crawford* v. *The William Penn* (1815) Pet. C. C. 106, Fed. Cas. No. 3,372); on the other hand, that it is no defense to an action that the plaintiff sued in trust for an alien enemy (*Daubuz* v. *Morshead* (1815) 6 Taunt. 332, 16 Revised Rep. 623). The theory of the latter case doubtless was that the ground of the objection goes rather to the enforcement of the judgment than to the maintenance of the suit.

An action is not maintainable by an agent on behalf of his principal where the principal is an alien enemy (*Brandon* v. *Nesbitt* (1794) 6 T. R. 23, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649); though the fact that a suit is prosecuted on behalf of alien enemies by an agent, himself under no disability to sue, cannot be taken advantage of under a plea of the general issue (*Flindt* v. *Waters* (1812) 15 East, 260, 13 Revised Rep. 457).

In *Maxwell* v. *Grunhut* (1914) 31 Times L. R. 79, 59 Sol. Jo. 104, it was held that the agent of an alien enemy could not be appointed as a receiver of the assets of his principal's business in England for the purpose of enabling him to collect debts due to his principal, it being obvious that the agent could have no greater right than his principal, who, being an alien enemy, could not sue.

Alien enemies are incapable of making a valid demise for the purpose of maintaining an action of ejectment. *Jackson ex dem. Johnston* v. *Decker* (1814) 11 Johns. 418.

A plea of alien enemy is defeated by the conclusion of a treaty of peace (*Johnson* v. *Harrison* (1815) Litt. Sel. Cas. 226); and a suit, not being abated during the war, cannot be abated after the conclusion of peace (*Hamersley* v. *Lambert* (1817) 2 Johns. Ch. 508). The error, if any, in permitting an action brought by an alien enemy to proceed to judgment, becomes immaterial where peace has been concluded. *Bishop* v. *Jones* (1866) 28 Tex. 294.

In *Janson* v. *Driefontein Consol. Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268, Lord Davey observed that he had some doubt whether the objection of alien enemy might be waived, it being one based on considerations of public policy of which the court should be held

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bound to take notice. This *dictum* is cited with approval in *Bassi* v. *Sullivan* (1914) 32 Ont. L. Rep. 14; and a similar doubt was expressed in *Robinson* v. *Continental Ins. Co.* [1915] 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7

And in *Dorsey* v. *Kyle* (1869) 30 Md. 512, 96 Am. Dec. 617, it is said that the plea of alien enemy is not a matter of privilege, but a disability that suspends the right to maintain an action in the courts of the country to which the party is an enemy.

Where, during the pendency of an action the plaintiff becomes an alien enemy, the court has no legal power to render judgment (*Brooke* v. *Filer* (1871) 35 Ind. 402); and a decree rendered in a cause instituted before the commencement of war, the parties to which resided on opposite side of the military line and were consequently enemies to each other, is without legal validity. *Stephens* v. *Brown* (1884) 24 W. Va. 234.

But in *McNair* v. *Toler* (1875) 21 Minn. 175, where the action was instituted before the war, it was held that the objection that the plaintiff was technically an alien enemy, like all other objections to his capacity to sue, was waived by the omission to plead it in abatement.

b. Where enemy does not reside in his own country.

The disability to sue which attaches to the character of alien enemy continues only while the party is abiding in his own country (*Seymour* v. *Bailey*, 66 Ill. 288); and accordingly does not exist where the alien enemy is permitted to enter or remain in the country (*Crawford* v. *The William Penn* (1815) Pet. C. C. 106, Fed. Cas. No. 3,372; *Otteridge* v. *Thompson* (1814) 2 Cranch, C. C. 108, Fed. Cas. No. 10,618; *Hepburn's Case* (1830) 3 Bland, Ch. 95; *Russel* v. *Skipwith* (1814) 6 Binn. 241). "A lawful residence implies protection and a capacity to sue and be sued." *Clarke* v. *Morey* (1813) 10 Johns. 69.

An alien enemy, as such, is not thereby debarred from resorting to the court for relief during the continuance of the state of war, but while permitted to remain in the country is exonerated from the disability of enemy, occupying the same position as any other foreigner except as to carrying on trade with the enemy country. *Thurn & Taxis* (*Princess*) v. *Moffitt* [1915] 1 Ch. 58, [1914] W. N. 379, 31 Times L. R. 24, 59 Sol. Jo. 26; *Bassi* v. *Sullivan* (1914) 32 Ont. L. Rep. 14; *Oskey* v. *Kingston* (1914) 32 Ont. L. Rep. 190; *Volkl* v. *Rotunda Hospital* [1914] 2 Ir. R. 543.

It makes no difference that he has been interned as a civilian prisoner of war. *Schaffenius* v. *Goldberg* (1915) 113 L. T. 949, affirming 32 Times L. R. 31.

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An alien subject of an enemy country residing in Canada is entitled to maintain an action against his employer for personal injuries. *Viola* v. *Mackenzie, M. & Co.* (1915) — Quebec, —, 24 D. L. R. 208.

An alien enemy commorant in the jurisdiction by the license of the government and under its protection may sue, though he came in time of war without a safe-conduct. *Wells* v. *Williams* (1697) 1 Ld. Raym. 282, 1 Salk. 46, 1 Lutw. 34.

The fact that the plaintiff is a woman whose husband is actually engaged in hostile warfare does not alter the situation where the basis of the action is a right individual to herself. *Thurn & Taxis (Princess)* v. *Moffitt, supra.*

A native of a neutral state taken in an act of hostility on board an enemy's fleet is not disabled from suing while in confinement on a contract entered into as a prisoner of war. *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & P. 163, 2 Esp. 580, 4 Revised Rep. 772; in which, however, it was intimated that the same conclusion would have been reached had the plaintiff been an alien enemy born.

A loyal citizen having a residence in hostile territory, but who leaves the enemy's country at the opening of the war and has his abode during its continuance on loyal or neutral ground, is not to be regarded as an alien enemy and as subject to the disabilities of that position, since money or property recovered by him will not be brought by the recovery within the reach of the enemy and rendered liable to seizure by the enemy for the maintenance of the war. *Zacharie* v. *Godfrey* (1869) 50 Ill. 186, 99 Am. Dec. 506.

An action can be maintained by a person of enemy nationality who is neither residing nor carrying on business in an enemy country, but resides either in an allied or neutral country and carries on business through his partners in that allied country. *Re Duchess of Sutherland* (1915) 31 Times L. R. 248.

In order to entitle an alien subject of an enemy country, residing within the jurisdiction, to sue, it is not necessary for him to allege and prove that he is not a spy and has not committed acts of hostility, but the exception should be invoked by the one who relies upon it. *Viola* v. *Mackenzie, M. & Co.* (1915) — Quebec, —, 24 D. L. R. 208.

c. Suits growing out of transactions permitted by the government.

If the contract on which the suit is brought arises directly or collaterally out of a trade licensed by the sovereign authority of the government in whose courts redress is sought, enemy interest in the subject in controversy will not defeat the action. *Crawford* v. *The William Penn* (1815) Pet. C. C. 106, Fed. Cas. No. 3,372; *United States* v. *100 Barrels of Cement* (1862) Fed. Cas. No. 15,945.

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d. Effect of war on suit previously instituted, judgment recovered, or appeal pending.

In some jurisdictions it has been held that where an action has been commenced before the war, the proceeding is only suspended (*Levine* v. *Taylor* (1815) 12 Mass. 8; *Bell* v. *Chapman* (1813) 10 Johns. 183; *Luczycki* v. *Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. Rep. 549); whereas a suit brought after the commencement of the war will be dismissed (*Whelan* v. *Cook* (1867) 29 Md. 1); even though, if dismissed, the statutory period of limitation may possibly run and so put an end to the action (*Dangler* v. *Hollinger Gold Mines* (1915) 34 Ont. L. Rep. 78).

So, in *Hutchinson* v. *Brock* (1814) 11 Mass. 119, where the action had been commenced before war was declared, it was said that the effect of the plea of alien enemy is not to abate the writ or defeat the process entirely, but to suspend it; and the judgment to be entered upon it when the plea shall be confessed or maintained is that the writ aforesaid remain without day until the intercourse or the peace of the two countries shall be restored.

The disability of alien enemy occurring after the commencement of the action only suspends the proceeding during the war, and after the disability is removed the plaintiff may recontinue the suit by resummons or reattachment. *Elgee* v. *Lovell* (1865) Woolw. 102, Fed. Cas. No. 4,344.

In *Luczycki* v. *Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. Rep. 549, it is said that a very clear line of division is to be marked as to cases where the alien plaintiff is rightly in court and had a vested right of action as an alien friend before that character had been transformed by war to that of an alien enemy.

In other cases it is held that where the plaintiffs become alien enemies subsequently to the institution of the suit, the action should be dismissed rather than continued on the docket (*Howes* v. *Chester* (1861) 33 Ga. 89); but the dismissal should be without prejudice (*Dumenko* v. *Swift Canadian Co.* (1914) 32 Ont. L. Rep. 87).

[But see in connection with the case of *Dumenko* v. *Swift Canadian Co. supra,* the remarks of Boyd, C., in *Luczycki* v. *Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. Rep. 549, who said that "the *Dumenko Case,* as stated in the judgment, is founded on *Le Bret* v. *Patillon* (1804) 4 East, 502, 7 Revised Rep. 618, and *Brandon* v. *Nesbitt* (1794) 6 T. R. 23, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649. Now in *Brandon* v. *Nesbitt,* the plaintiff was an alien enemy at the outset, and so was never rightly in court. *Le Bret* v. *Patillon* is in point, for there the action was rightly brought, but its course was intercepted by declaration of war. The defendant's contention was made by way of dilatory plea, and the judgment was that the plaintiff should be barred from further having and maintaining

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the action. Nothing is said as to costs, and in form the action was not dismissed. In the *Dumenko Case* the judgment may well be rested on the fact that the plaintiff was in default in giving security for costs. By the order, if security not given the action was to be dismissed. The plaintiff, the alien enemy, moved to obtain an extension of time, which favor will not be granted to an alien enemy, and the action was well dismissed, with costs."]

The court will refuse to dissolve an injunction against the enforcement of a judgment where since the injunction has been obtained the plaintiffs have become alien enemies. *Taylor* v. *Morgan* (1812) 2 Mart. (La.) 263.

Where the plaintiff in a suit becomes an alien enemy after judgment, the court will not, on motion, stay or set aside the execution, but the defendant may avail himself of his remedy at law. *Vanbrynen* v. *Wilson* (1808) 9 East, 321; *Buckley* v. *Lyttle* (1813) 10 Johns. 117.

According to an early case in the United States Supreme Court, it would seem that if war breaks out during the pendency of a writ of error, the plaintiff in error cannot take advantage of the fact that the original plaintiff is an alien enemy, but the judgment may be affirmed. See *Owens* v. *Hanney* (1813) 9 Cranch, 180, 3 L. ed. 697. But a recent English case holds that where two coplaintiffs have given notice of appeal before the outbreak of war and one of them has on the outbreak of war become an alien enemy, the appeal must be suspended during the war. *Actien-Gesellschaft Für Anilin-Fabrikation* v. *Levinstein* (1915) 31 Times L. R. 225, 32 R. P. C. 140, 112 L. T. N. S. 963 [1915] W. N. 85, 84 L. J. Ch. 842.

e. Nature and form of plea.

The plea of alien enemy is a plea of disability, but it might by common law be pleaded also in bar because the debt itself was considered as forfeited to the sovereign as a reprisal for the damages committed by the enemy; but as private debts are not now in fact confiscated by civilized nations in the event of war between them, it may well be doubted if such a plea is now good, the reason or ground for it having entirely failed. *Levine* v. *Taylor* (1815) 12 Mass. 8.

But in *Knoefel* v. *Williams* (1868) 30 Ind. 1, it was held that the right of action may revive at the termination of the war is no objection to the rule that a plea of alien enemy may be in bar of the action.

If the disability accrues by war pending the suit, then it can be pleaded in abatement, as it only suspends the action. *Russ* v. *Mitchell* (1864) 11 Fla. 80.

In *Sylvester's Case* (1703) 7 Mod. 150, it was held that "alien

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enemy" was a good plea in abatement, "for though . . . [the plaintiff] be a poor refugee and under the Queen's protection, which enables him to sue, yet whether his protection be special, or general as by proclamations, he ought to plead it."

As the defense is merely technical and dilatory, growing out of a supposed temporary disability, it must, to be effectual, be pleaded specially and with certainty to a particular intent. *Burnside* v. *Matthews* (1873) 54 N. Y. 78.

Where it is sought to defeat a suit by a plea of alien enemy, the plea must contain an averment that such was the character and status of the plaintiff when the suit was commenced. *Elgee* v. *Lovell* (1865) Woolw. 102, Fed. Cas. No. 4,344.

It has been held, on the one hand, that a plea of alien enemy should aver either that the plaintiff is alien born and within the jurisdiction without protection or safe conduct from the government, or, if not an alien born, that he is resident with the enemy (*Parkinson* v. *Wentworth* (1814) 11 Mass. 26); that to render the plea of alien enemy good, the plea must not only aver that plaintiff was an alien enemy, but that he was adhering to the enemy (*Clarke* v. *Morey* (1813) 10 Johns. 69); and that it is necessary to state that the plaintiff had no permission to remain in the country (*Bagwell* v. *Babe* (1828) 1 Rand. (Va.) 272); on the other hand, that it is not necessary to allege that the persons alleged to be alien enemies are resident in the enemy's country (*Johnson* v. *13 Bales* (1814) 2 Paine, 639, Fed. Cas. No. 7,415; *Russel* v. *Skipwith* (1814) 6 Binn. 241).

II. As parties defendant.

a. In general.

While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other whenever the latter can be reached by process (*Masterson* v. *Howard* (1873) 18 Wall. 99, 21 L. ed. 764); since the reason of policy which suspends the right of action of an alien enemy during the war does not apply where the suit is not by one of the enemy to collect his resources, but by a citizen to put himself in means (*Seymour* v. *Bailey* (1872) 66 Ill. 288). In *Dorsey* v. *Thompson* (1872) 37 Md. 25, it is said: "Whether the ground of the defense of alien enemy be the possible benefit that might result to the enemy from allowing the plaintiff to recover, or the want of claim or right to the use of the courts of the country by the plaintiff, in consequence of his status as an enemy, the reason that creates the disability of the party as plaintiff

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does not apply to him as defendant. As plaintiff, the party attempts to exercise a privilege that he has forfeited, at least for the time; but, as defendant, he is sought to be made amenable for what justice may require of him. The mode and manner of acquiring jurisdiction, and making the proceedings binding on him, is another and a different question from that of his total exemption from suit pending hostilities. This depends upon the remedial processes of the courts; and, as is well-known, they are generally wholly inadequate during a state of actual war in suits *in personam,* to furnish the foundation for exercising jurisdiction over alien enemies residing in the enemy's territory. But still these enemies are liable to be sued, if within the reach of process."

And see also to the same effect, *Robinson* v. *Continental Ins. Co.* [1915] 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7; *Cocks* v. *Izard* (1871) Fed. Cas. No. 2,934; *Russ* v. *Mitchell* (1864) 11 Fla. 80; *Buford* v. *Speed* (1875) 11 Bush, 338; *Dorsey* v. *Kyle* (1869) 30 Md. 512, 96 Am. Dec. 617; *McNair* v. *Toler* (1875) 21 Minn. 175; *De Jarnette* v. *De Giverville* (1874) 56 Mo. 440; *Compagnie Universelle de Telegraphie et de Telephonie sans Fil* v. *United States Service Corporation* (1915) — N. J. —, 95 Atl. 187; *Griswold* v. *Waddington* (1818) 15 Johns. 57; *Rodgers* v. *Dibrell* (1880) 6 Lea, 69.

In *Lee* v. *Rogers* (1874) 2 Sawy. 549, Fed. Cas. No. 8,201, it was held that a bill in equity may be brought against an alien enemy to remove a cloud on title, and that service may be made by publication.

But though an alien enemy may be made a party defendant, he may not, of course, prosecute a counterclaim. *Robinson* v. *Continental Ins. Co.* [1915] 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7.

The liability of an alien enemy to be sued carries with it the right to use all the means and appliances of defense. *Seymour* v. *Bailey* (1872) 66 Ill. 288; and see also *Compagnie Universelle de Telegraphie et de Telephonie sans Fil* v. *United States Service Corp. supra.* He is entitled to appear by attorney and be heard in his defense. "It would be revolting to the rules of justice which govern a court to drag therein a party and then say to him, although you are properly before the court you are an alien enemy and shall not be heard, yet judgment shall be rendered against you." *Russ* v. *Mitchell* (1864) 11 Fla. 80. He may appear by attorney to defend proceedings for the confiscation of his property, and may sue out a writ of error. *McVeigh* v. *United States* (1870) 11 Wall. 259, 20 L. ed. 80. He may have a discovery for the purpose of conducting his defense, just as he would be allowed process to compel the attendance of his

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witnesses. *Albretcht* v. *Sussmann* (1813) 2 Ves. & B. 323, 13 Revised Rep. 110.

The fact of being an alien enemy cannot avail a defendant who is accorded the privilege of appearing by attorney. *Herbert* v. *Rowles* (1869) 30 Md. 271.

There is no rule of common law which prevents a nonresident alien enemy appearing and conducting his defense. *Robinson* v. *Continental Ins. Co.* [1915] 1 K. B. 155. In this case the court, referring to the difficulties attending suit against a nonresident alien enemy, said: "In this case I understand that the presence of the alien enemy in this country at the trial is not necessary and is not contemplated, and no difficulty arises such as might otherwise be created by the impossibility of his getting here, and no question arises in this case as to whether an express license to come into this country is necessary, or whether a license would be implied from the fact of the process of the court, and I express no opinion upon it. It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses, or in other ways, that it would be right to grant them a postponement on those grounds. If any application is made to postpone the trial on grounds of that character it will be dealt with on its merits."

In *Robinson* v. *Continental Ins. Co. supra,* it was intimated that in the event of the defendant succeeding in the action, no order which would entitle him to payment of costs during the war ought to be made, and that his right to issue execution ought to be suspended until the cessation of the state of hostilities.

A defendant's privilege of being sued in the county where he resides ceases when he voluntarily becomes an alien enemy. *Russ* v. *Mitchell* (1864) 11 Fla. 80.

In *Re Radeke* (1915) 84 L. J. K. B. N. S. 2111, it is held that the discretion to stay proceedings under a bankruptcy petition vested in the court by § 1, subsection 3, of the courts (emergency powers) act 1914, which provides that "where a bankruptcy petition has been presented against any debtor and the debtor proves to the satisfaction of the court having jurisdiction in bankruptcy that his inability to pay his debts is due to circumstances attributable directly or indirectly to the present war, the court may in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, at any time stay the proceedings under the petition for such time and subject to such conditions as the court thinks fit," cannot, in view of subsection 7 of the same section, which provides that "nothing in this act shall . . . give any power to stay execution or defer the operation of any remedies of a creditor in the case of a sum of money payable by or recoverable from, the subject of a sovereign or state at war with his majesty,"—be exercised in

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favor of a debtor who is the subject of a state at war with England, although he is a resident of England.

b. Sufficiency of constructive service.

Although the enemy character of a defendant does not preclude the maintenance of an action against him, it is nevertheless essential to the rendition of a valid judgment that the court acquired jurisdiction. Unless he has some agent in the country upon whom process may be served, it is generally necessary to resort to service by publication; and whether jurisdiction may be acquired in this way is a controverted question. Inasmuch as intercourse between citizens of belligerent states is ordinarily unlawful, the status of an enemy differs from that of an ordinary nonresident defendant, and this has influenced some courts to hold that constructive service upon such an one is ineffectual. According to other courts, however, it would seem that the nonintercourse rule is to be relaxed *pro hac vice*, since they hold that service by publication is good.

That jurisdiction over a nonresident enemy cannot be obtained by constructive service, since he may neither legally see nor obey the notice to appear is held in *Haymond* v. *Camden* (1883) 22 W. Va. 180; *Sturm* v. *Fleming* (1883) 22 W. Va. 404; and *Dorr* v. *Gibboney* (1878) 3 Hughes, 382, Fed. Cas. No. 4,006.

So, also, in *Selden* v. *Preston*, 11 Bush, 191, it was held that a creditor may not, obtain personal judgment against an alien enemy upon constructive service only.

In *Livingston* v. *Jordan* (1869) Chase, 454, Fed. Cas. No. 8,415, Chase, J., charged the jury that as between the parties residing in a seceding state and parties residing in the states which adhered to the national government during the Civil War, between whom war made intercourse impossible, there could be no jurisdiction in the courts of the seceding state, while the war continued, by which the rights of nonresidents could be injuriously affected.

In *Rockhold* v. *Blevins* (1873) 6 Baxt. 115, and *Walker* v. *Day* (1874) 8 Baxt. 77, it was held that a judgment cannot be rendered against an alien enemy upon constructive service, the court in the latter case saying: "Publication is a substitute for summons, and is presumed, under ordinary circumstances, to come to the notice of him to whom it is directed. In war such as then raged in these states, no such presumption can arise for and against parties divided by two hostile armies, with every inlet and outlet picketed and guarded every moment of day and night by details from every arm of the service on both sides. It was next to impossible for persons to pass through; the attempt to do so was taking one's life into his own hands, and running the gauntlet with all the chances against him. To have presumed that the notice was seen or known of, and there-

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fore requiring the party to be affected by it, was to presume and require impossibilities."

On the other hand, in *Dorsey* v. *Dorsey* (1869) 30 Md. 522, 96 Am. Dec. 633, the court, in discussing the validity of a judgment rendered upon service by publication, said: "The argument in favor of the appellant, stated in its strongest light, is this: The object of the order of publication, made under the law affecting an absent or nonresident defendant, is to notify and warn him to appear by a certain day in court and defend his rights; that no man can have those rights impaired in any court without an opportunity of so defending them, and no court has jurisdiction over them until it has afforded him such opportunity; that the notice thus given is equivalent to personal notice by the service of a writ, and all proceedings are void unless one notice or the other is given; that whilst war exists the notice by order of publication is utterly futile and unlawful, all intercourse between the citizens of the respective governments being prohibited; that it could not possibly reach the party for whom it was intended, because no communication could be had between the place of publication and the place where the party intended to be notified, resided at the time; and even if by legal possibility such notice could reach him, still, being an enemy, he could not appear and defend; the notice, therefore, in this case was a notice which could not possibly reach the appellant, requiring him to do a thing which he could not possibly perform,—a notice impossible to be known, to do a thing impossible to be done,—and such an order of publication must by consequence be utterly futile, illegal, and void. But a brief examination of the provisions, purpose, and object of the law relating to nonresident owners of property here situated, who are made defendants in chancery suits in this state affecting such property, will, we think, afford a sufficient answer to this argument. All that the law requires in such cases is that the court shall order notice to be given by publication in one or more newspapers, stating the substance and object of the bill, and warning the nonresident to appear on or before a day fixed in its order, and show cause why the relief prayed should not be granted, such notice to be published as the court may direct, but not less than once a week for four successive weeks, three months before the day fixed by the order for the appearance of the party, and if he does not appear at the time stated, the court is then authorized to proceed in the case by passing a decree *pro confesso,* or taking testimony *ex parte,* and then to final decree upon the subject-matter. The law applies to all nonresidents wherever they may reside, and the order is passed upon the mere allegation of the bill that the defendant is a nonresident, without stating his place of actual abode, which, in many, if not a majority of cases, is unknown either to the complainant or the court. It is to be passed by the court and published, and when these things are done full

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authority is given to proceed to decree without regard to the fact, whether the notice was ever seen by the defendant or not, and without reference to the possibility of its reaching him, or of his ability to appear in compliance with the warning it contains. Strict compliance with the requisites of the statute is demanded; but when this is done and the case has proceeded to final decree, the property sold, and title acquired thereunder, the courts will not listen to any evidence that the party has not or could not actually receive the notice, or make his appearance. It is simply a statutory mode of conferring upon the court power to pass judgment on property, the subject-matter of suit within its jurisdiction, when the owner is beyond the reach of its process. The courts in such cases act upon the presumption of notice which they will not allow to be rebutted. The whole theory of the law of constructive notice rests upon this foundation. In numerous cases an equal impossibility of receiving and complying with the notice exists as in the case of war. A party may be sick or imprisoned in a distant land at such place and under such circumstances that within the time limited no notice could by any possibility reach him; but this or any other *vis major,* or act of God, will not oust the jurisdiction of the court over his property once obtained by pursuing the requirements of the statute, or defeat the title acquired under its final decree thereon. If war and residence in enemy's territory can be set up to avoid the proceedings and defeat the title, there is no good reason why any other cause creating an equal impossibility of receiving notice should not be allowed to have the same effect. This would defeat the very object of the law, embarrass judicial proceedings, and render insecure titles derived under judicial sales."

In *Seymour* v. *Bailey* (1872) 66 Ill. 288, it was held that a presidential proclamation, issued in pursuance of an act of Congress, prohibiting all commercial intercourse with the enemy, does not suspend the operation of statutes authorizing the prosecution of suits against nonresident defendants upon constructive service by publication of notice, so as to deprive the courts in such cases of all jurisdiction and to render their proceedings null and void.

There is a third group of cases which, without going so far as to assert that jurisdiction may be acquired by constructive service over a nonresident enemy, hold that a citizen may be proceeded against by publication as an absentee, notwithstanding he has become an adherent of the enemy.

Thus in *Dorsey* v. *Thompson* (1872) 37 Md. 25, it was held that an alien enemy may be served by publication where he has become such since the commencement of the war, at which time he was a resident citizen.

In *Ludlow* v. *Ramsey* (1871) 11 Wall. 581, 20 L. ed. 216, it is held that if a party voluntarily leaves his country or his residence for

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the purpose of engaging in hostilities against the former, he cannot complain of legal proceedings regularly prosecuted against him as an absentee.

In *Peerce* v. *Carskadon* (1870) 4 W. Va. 234, 6 Am. Rep. 281, a statute providing that if parties were in sympathy with the Rebellion, and had left their usual places of abode, and were out of the reach of civil process for ninety days, they were to be regarded as nonresidents, was held not to be invalid as violating vested rights or as an *ex post facto* law.

c. Attachment proceedings.

The same difference of opinion pervades the decisions on the question whether the property of a nonresident alien enemy may be reached by attachment.

In *Thomas* v. *Mahone* (1872) 9 Bush, 111, it was held that it does not follow because a person is an alien enemy, with whom all unlicensed communication is forbidden, that resident creditors may not sue him and subject to the payment of their debts such of his property as may be found within the jurisdiction.

The land of a nonresident enemy may be sold for the payment of his debts. *Crutcher* v. *Hord* (1868) 4 Bush, 363.

The fact that a debtor is an alien enemy will not preclude his creditor from proceeding by attachment against his property. *Mixer* v. *Sibley* (1869) 53 Ill. 61; *Selden* v. *Preston,* 11 Bush, 191; *Jenkins* v. *Hannan* (1884) 26 Fed. 657.

A citizen creditor may sue by attachment to obtain satisfaction from a nonresident alien enemy debtor. *Hepburn's Case* (1830) 3 Bland, Ch. 95.

The property of one who voluntarily becomes an alien enemy is subject to attachment. "His being an alien enemy does not make him the less a nonresident debtor." *Dorsey* v. *Kyle* (1869) 30 Md. 512, 96 Am. Dec. 617.

But in *Haymond* v. *Camden* (1883) 22 W. Va. 180, it was held that a suit instituted by a creditor during the war to enforce the payment of his debt by attachment against the property of a debtor who is in the position of an alien enemy, or to enforce a vendor's lien, is without legal sanction or authority, and all proceedings had therein are void.

d. Enforcement of mortgage, deed of trust, or other lien.

Where it is sought to enforce a mortgage, deed of trust, or other lien for the security of a debt, a further difficulty is raised by the contention that as payment of a debt during the war is unlawful, it is not legally due, and therefore that no resort may be had to the security. This contention is borne out by the cases which hold that

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the running of the statute of limitations is suspended during the continuance of the war.

In *Walker* v. *Beauchler* (1876) 27 Gratt. 511, it was held that as during the war the debtor could not legally pay or the creditor receive his debt, a deed of trust securing it cannot legally be enforced.

Payment of a debt to an enemy creditor during the war being unlawful, a sale under a deed of trust securing the debt is void. *Kanawha Coal Co.* v. *Kanawha & O. Coal Co.* (1870) 7 Blatchf. 391, Fed. Cas. No. 7,606.

So, also, in *Grinnan* v. *Edwards* (1883) 21 W. Va. 347, it was held that as payment might not lawfully be made, a land contract could not be foreclosed, and that a decree of sale to pay the unpaid purchase money was absolutely void.

A legal decree of foreclosure cannot be rendered against defendants who have been expelled by military force from their residence, and who are forbidden absolutely by the order which expelled them from coming back again. *Dean* v. *Nelson* (1869) 10 Wall. 158, 19 L. ed. 926; *Lasere* v. *Rochereau* (1873) 17 Wall. 437, 21 L. ed. 694.

The courts have, however, declined to give effect to the above contention where the debtor was originally a citizen of the state, but has become an adherent of the enemy, apparently on the illogical ground that the conduct of such a person deserves to be visited with a penalty. These cases, which were occasioned by the Civil War, and the decisions in which may have been influenced by partisan feeling, are open to criticism as disregarding the legal right of all the citizens of a nation to take sides in a civil conflict, together with the consequence attaching to the status of belligerents so acquired.

So, in *Harper* v. *Ely* (1870) 56 Ill. 179, it was held that a sale under a mortgage is valid where the mortgagor left the state for the purpose of engaging in hostilities.

The real estate of a nonresident enemy situated in the state may be subject to the payment of a debt contracted before the war began and secured by a mortgage on the property itself, executed and recorded while the debtor himself was a resident of the state. *Dorsey* v. *Dorsey* (1869) 30 Md. 522, 96 Am. Dec. 633.

And a bill of equity will not lie to redeem lands sold under a deed of trust on the ground that the maker was, when the land was sold, a member of the enemies' forces and a prisoner of war, where it further appeared that he had voluntarily become an alien enemy. *Black* v. *Gregg* (1875) 58 Mo. 565.

In *Johns* v. *Slack* (1875) 2 Hughes, 467, Fed. Cas. No. 7,363, it was held that lands might be sold to satisfy the vendor's claim for unpaid purchase money, though the purchaser was absent during war with the other belligerent power and had no notice of the motion for the sale, or of the sale itself.

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A distinction between sales by judicial proceedings and a sale under a power contained in a mortgage or deed of trust is made in *Washington University* v. *Finch* (1873) 18 Wall. 106, 21 L. ed. 818, where it is said: "The argument is that, inasmuch as all commercial intercourse was forbidden between the people of the loyal states and those residing in the insurrectionary district, both by virtue of the act of Congress and by the principles applicable to nations in a state of war, all processes for the collection of debts were suspended, and that the complainants being forbidden by these principals to pay the debt, there could be no valid sale of the land for default of such payment. The case before us was not one of a sale by judicial proceeding. No aid of a court was needed or called for. It was purely the case of the execution of a power by a person in whom a trust had been reposed in regard to real estate, the land, the trustee, and the *cestui que trust* all being, as they had always been, within a state whose citizens were loyally supporting the nation in its struggle with its enemies. The conveyance by the complainants to Ranlett vested in him the legal title of the land, unless there was a statute of the state of Missouri providing otherwise, and if there was such a statute it still gave him full control over the title for the purposes of the trust which he had assumed. No further act on the part of the complainants was necessary to transfer the title and full ownership of the property to a purchaser under a sale by the trustee. The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had both been dead, the sale would not have been void for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power made for his benefit executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not in our judgment afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect; the right of the holder of the note to have him exercise that power was perfect. Its exercise required no intercourse, commercial or otherwise, with the complainants. No military transaction would be interfered with by the sale. The enemy, instead of being strengthened, would have been weakened by the process. The interest of the complainants in the land might have been liable to confiscation by the government, yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country or any other is shown to us for this proposition. It rests upon inference from the general doctrine of absolute

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nonintercourse between citizens of states which are in a state of public war with each other, but no case has been cited of this kind even in such a war. It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper, that this notice was intended to apprise the complainants of the time and place of sale, and that inasmuch as it was impossible for such notice to reach the complainants no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach them to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms, and the place of sale, and of the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default and his property liable to sale at any time; and no notice to him is required."

So, also, in other cases it has been held that the absolute power to sell on default conferred upon the trustee in a deed of trust to secure a debt may be exercised notwithstanding the debtor is an alien enemy. *De Jarnette* v. *De Giverville* (1874) 56 Mo. 440 (where, however, it appeared that the time the default was made there was no suspension of intercourse between the state of the plaintiff and that of the defendant); *Martin* v. *Paxson* (1877) 66 Mo. 260 (where it appeared that the trustor had voluntarily gone within the enemy's lines); *Mitchell* v. *Nodaway County* (1883) 80 Mo. 257; *Washington University* v. *Finch* (1873) 18 Wall. 106, 21 L. ed. 818; *Willard* v. *Boggs* (1870) 56 Ill. 163; *Bush* v. *Sherman* (1875) 80 Ill. 160.

III. Right to habeas corpus.

A prisoner of war is not entitled to the privilege of the writ of habeas corpus to examine into the propriety of his detention (*Three Spanish Sailors* (1780) 2 W. Bl. 1324), even though he is the subject of a neutral power and forcibly compelled to serve on board the enemy's ship where he was taken (*Rex* v. *Schiever* (1759) 2 Burr. 765). It has even been held that the court will not grant a habeas corpus ad testificandum to bring up a prisoner of war as a witness. *Furly* v. *Newnham* (1780) 2 Dougl. K. B. 419.

The rule that the court will not entertain an application for habeas corpus from a prisoner of war has been held to apply to a civilian, subject of an enemy state, who has been interned as a measure of public safety. *Rex* v. *Vine-street Police Station* (1915) 113 L. T. N. S. 971; *Re Gusetu* (1915) 29 Can. Crim. Cas. 427. E. S. O.

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[ENGLISH COURT OF APPEAL.]

FITZROY v. CAVE.

[1905] 2 K. B. 364.
Also Reported in 74 L. J. K. B. N. S. 829, 54 Week. Rep. 17, 93 L. T. N. S. 499, 21 Times L. R. 612.

Assignment of debt — Chose in action — Maintenance — Indirect motive on part of assignee — Trust in respect of moneys recovered — Judicature act 1873 (36 & 37 Vict. chap. 66), § 25, subsec. 6.

The plaintiff took from creditors of the defendant an absolute assignment of their debts in consideration of a covenant by him that, if he should recover the amount of the debts from the defendant, he would pay over to them the amounts of their respective debts or so much thereof as he might be able to realize after payment of the costs necessarily incurred by him. Notice in writing of the assignment was given to the defendant. It appeared that the plaintiff and the defendant were codirectors of a company, and the plaintiff, being dissatisfied with the action of the defendant as director of the company, took the assignment with a view to procuring an adjudication of bankruptcy against the defendant, and so getting him removed from the directorate of the company:

Held (by Collins, M.R., Mathew, L.J., and Cozens-Hardy, L.J., the M.R. doubting), that the assignment of the debts was not invalid as savoring of maintenance or being otherwise against public policy.

Comfort v. *Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. N. S. 656, 64 L. T. N. S. 685, 35 Week. Rep. 595, 55 J. P. 630, followed.

(June 9, 1905.)

APPEAL from the judgment of Lawrance, J., in an action tried before him without a jury.

The action was brought by the plaintiff as the assignee of certain debts.

It appeared that the defendant was at the date of the aftermentioned deed indebted to five tradesmen in Ireland in various sums, amounting in all to 90*l.* 11*s.* 5*d.*, in respect of goods sold and delivered by them respectively to him. By a deed dated October 13, 1904, and made between these tradesmen of the [365] one part and the plaintiff of the other part, after reciting that the parties of the first part had agreed to assign the said debts to the plaintiff upon the terms and for the consideration thereinafter set forth, it was witnessed that, in pursuance of such agreement, and for and in consideration of the covenant

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and agreement on the part of the plaintiff thereinafter contained, the parties of the first part thereby respectively assigned to the plaintiff the said debts to hold the same respectively to the plaintiff absolutely. The deed then proceeded: "And the assignee hereby covenants with the assignors, and with each of them, that, in case he shall be able to recover and realize the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realize, after payment of all costs necessarily incurred by him." Notice in writing of this assignment had been given to the defendant.

It appeared in evidence that the plaintiff was interested in, and a director of, a company called the Cork Mineral Development Company. The defendant was a codirector and the local manager of the company. The plaintiff, being dissatisfied with the action of the defendant as a director of the company, had, acting under the advice of a solicitor, taken the assignment of the before-mentioned debts with the view of procuring an adjudication in bankruptcy against the defendant, and so getting him removed from the directorate of the company.

Lawrance, J., held, with some doubt, that, under these circumstances, the assignment was invalid as savoring of maintenance or otherwise against public policy, and therefore gave judgment for the defendant.

Roskill, K.C., and **Raymond Asquith** for the plaintiff. Maintenance is where a person maintains a litigation, having no interest in the subject-matter of it, nor any relation to the litigant which justifies him in doing so. *Bradlaugh* v. *Newdegate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. N. S. 454, 31 Week. Rep. 792. The plaintiff in this case being the [**366**] assignee for good consideration, and legal owner of these debts, cannot possibly be said to have had no interest in the subject-matter of the litigation. The case of *Comfort* v. *Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. N. S. 656, 64 L. T. N. S. 685, 39 Week. Rep. 595, 55 J. P. 630, is a clear authority to show that such an assignment of debts as that in the present case is good and avails to pass the legal

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property in the debts. There is nothing that even savors of maintenance, or that is against public policy, in such a transfer of the property in debts for good consideration. It has been suggested that this transaction savors of maintenance, or is against public policy, on account of the motives of the plaintiff in procuring the assignment. It is submitted that the law cannot inquire into the motives with which an assignment of debts prima facie lawful is procured. A lawful transaction cannot be made unlawful on account of the inner motives of the person entering into it. *Bradford Corporation* v. *Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 190, 60 J. P. 3. The present case stands on the same footing legally as if the plaintiff had purchased these debts for cash. There are authorities, no doubt, which show that an assignment of a mere right of action, such as a right of action for damages for defamation, is invalid as amounting to maintenance. See *Alabaster* v. *Harness* [1894] 2 Q. B. 897; [1895] 1 Q. B. 339, 64 L. J. Q. B. N. S. 76, 14 Reports, 54, 71 L. T. N. S. 740, 43 Week. Rep. 196; *May* v. *Lane* (1894) 64 L. J. Q. B. N. S. 236, 14 Reports, 149, 71 L. T. N. S. 869, 43 Week. Rep. 193; *Torkington* v. *Magee* [1902] 2 K. B. 427, 71 L. J. K. B. N. S. 712, 87 L. T. N. S. 304, 18 Times L. R. 703; [1903] 1 K. B. 644, 72 L. J. K. B. N. S. 336, 88 L. T. N. S. 443, 19 Times L. R. 331; *Prosser* v. *Edmonds* (1835) 1 Younge & C. Exch. 481; 41 Revised Rep. 322. But an assignment of anything in the nature of property is valid (see *Dawson* v. *Great Northern and City Ry. Co.* [1905] 1 K. B. 260, 74 L. J. K. B. N. S. 190, 69 J. P. 29, 92 L. T. N. S. 137, 21 Times L. R. 114; *Tolhurst* v. *Associated Portland Cement Manufacturers* [1903] A. C. 414, 72 L. J. K. B. N. S. 834, 89 L. T. N. S. 196, 19 Times L. R. 677, 52 Week. Rep. 143); and the motives which induced the purchase of the property cannot be material. Moreover, it is submitted that there was nothing unlawful in the purpose for which the plaintiff procured the assignment of the debts. He had no malice against the defendant personally. He was entitled in his own interest, and for the preservation of the money which he had invested in the company, to take any lawful step to remove the defendant from the directorate.

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[They also cited *Hare* v. *London and North Western Ry. Co.* (1860) Johns. V. C. (Eng.) 722, 8 Week. Rep. 352.]

[**367**] **Holman Gregory,** for the defendant. On the assumption that the assignment of the debts to the plaintiff was valid in law, it no doubt easily follows that there is nothing in the nature of maintenance in the transaction. But this assumption really begs the whole question. It may be admitted that there was a good legal assignment of the debts in point of form, but a transaction which in substance contravenes public policy, or savors of maintenance, cannot be made good by being clothed in a legal dress. It is submitted that to purchase a right of action with such a collateral and indirect motive as actuated the plaintiff in this case savors of maintenance, even if it does not come exactly within the definition of it; and the authorities show that the law will not recognize such a purchase as valid. It is a transaction which brings about litigation, which would never have been initiated by the creditors themselves, and that not by way of a bona fide commercial speculation, but with a sinister and malicious purpose. Moreover, there was not in this case, in substance, a purchase of these debts. The plaintiff had really no interest in the debts themselves, and his only interest in the litigation was of a collateral and indirect character. The transaction really stands on the same footing as if the plaintiff had got the creditors to allow him to sue in their names on the terms that he would indemnify them against costs, and account to them for the proceeds of the action, with the indirect motive of rendering the defendant's position as director untenable. It is submitted that that would clearly have been maintenance, or have savored of maintenance. It can make no difference that in point of form there was an absolute assignment of the debts. [He cited *Harrington* v. *Long* (1833–4) 2 Myl. & K. 590; 39 Revised Rep. 304; *Wallis* v. *Duke of Portland* (1797) 3 Ves. Jr. 494; 4 Revised Rep. 78; *De Hoghton* v. *Money* (1866) L. R. 2 Ch. 164, 15 L. T. N. S. 403, 15 Week. Rep. 214; *Rees* v. *De Bernardy* [1896] 2 Ch. 437, 446, 65 L. J. Ch. N. S. 656, 74 L. T. N. S. 585; *Wood* v. *Downes* (1811) 18 Ves. Jr. 120, 11 Revised Rep. 160.

Roskill, K.C., in reply.

Cur. adv. vult.

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[368] **Collins, M.R.**, read the following judgment: This is an action originally started under order XIV., but sent to be tried in the short-cause list. Lawrance, J., has given judgment for the defendant, and the plaintiff appeals. The facts appear from the affidavits made under order XIV. and from the evidence of the plaintiff given at the trial. The plaintiff claimed as assignee of some small debts assigned to him by various creditors of the defendant on the terms of a deed which the plaintiff had caused to be prepared under the advice of a solicitor. The plaintiff explained that his object in taking these assignments was that he was desirous of getting rid of the defendant as a codirector of a company in which they were both interested, being satisfied that it was for the best interests of the company that the defendant, with whose conduct he was thoroughly dissatisfied, should be removed from the board. The defense was that the conditions of the assignment and the purpose for which it was procured rendered it unenforceable as evidencing a transaction which savored of maintenance. The learned judge was of that opinion, and gave judgment for the defendant. There is no dispute about the facts. The plaintiff's statement in cross-examination, as appears by the judge's note, was: "I want to get him off the board and I want to make him bankrupt, and he would have to leave the board. . . . Sole object was to get right of action to make him a bankrupt." It is necessary to scrutinize the terms of the assignment. The deed, which was made between five persons resident in Ireland of the one part and the plaintiff of the other part, after reciting that the defendant was indebted to the five parties of the first part in certain sums, and that they had agreed to assign the said debts to the plaintiff upon the terms and for the consideration thereinafter set forth, witnessed that in pursuance of such agreement and for and in consideration of the covenant and agreement on the part of the plaintiff thereinafter contained, they, the parties of the first part, thereby assigned to the plaintiff all the said debts to hold the same respectively to the plaintiff absolutely. The deed then proceeded: "And the assignee hereby covenants with the assignors, and with each of them, that, in case [369] he shall be able to recover and realize the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay

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over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realize after payment of all costs necessarily incurred by him." It is to be observed that no consideration is given by the assignee under the terms of this document, except the undertaking to hand over so much as he may be able to recover after payment of all costs necessarily incurred by him. If nothing is realized, no costs will be payable by the assignors. It seems to me, therefore, that under this arrangement he acquired nothing but a bare right of litigation, giving him no interest in the proceeds, but enabling him to take collateral proceedings for an ulterior purpose. Had he, without taking an assignment, undertaken to find the money for the litigation to be followed up to bankruptcy, I think the case of maintenance would be quite clear in its simplest form, unless actions to recover debts are incapable of being the subject of maintenance. So long as the real transaction is the same, the form in which it is carried out ought not to alter the legal effect, and in the view of a court of equity it was not allowed to do so. Whether maintenance or not in the strictest sense, it savored of maintenance. See *Wood* v. *Downes* (1811) 18 Ves. Jr. 120, at pp. 125, 126, 11 Revised Rep. 160; *Prosser* v. *Edmonds* (1835) 1 Younge & C. Exch. 481, at pp. 496 et seq., 41 Revised Rep. 322 and *Harrington* v. *Long* (1833–4) 2 Myl. & K. 590, 39 Revised Rep. 304. The terms of the assignment in this case, by which the assignor pays no costs and has to submit to a deduction for them only in the case of a sum being realized from which such deduction can be made, seem to be equivalent in this respect to the deed of indemnity to which so much importance was attached in the last of the above cases. The illustrations given in argument in that case by the defendant's counsel, both on the hearing before the Master of the Rolls and on the rehearing before Lord Brougham, seem to cover the precise facts of this case. Assuming, therefore, that actions of debt do not stand on a [**370**] different footing in this respect from all other actions, and are capable of being made the subject of maintenance, in my opinion, but for the case of *Comfort* v. *Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. N. S. 656, 64 L. T. N. S. 685, 39 Week. Rep. 595, 55 J. P. 630, the argument for the defendant ought to succeed. That is a decision

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of the Court of Appeal, and binds us, unless there is such a difference in the terms of the assignment as to distinguish it from the assignment in this case. There is nothing mentioned in the Law Reports as to the provision for costs. The effect of the transaction, however, was referred to in these terms by Lord Esher, M.R.: "Large numbers of debts were assigned to debt collectors without their having any interest in such debts and merely for the purpose of their being sued for;" and we were told by the appellant's counsel that the conditions of the assignment were the same as those in this case; and from the report in 64 L. T. N. S. 685, this would seem to be so. If this be so, I see no reason why the transaction might not have been impeached on precisely the same grounds as those which were urged in this case. It is true that the point of maintenance was not distinctly raised, but some considerations of public policy were undoubtedly discussed, and the court held that the assignment was good under § 25, subsec. 6, of the judicature act 1873. The decision is, therefore, an authority in this court that such an assignment can be enforced. No doubt there was no evidence in that case as there is here of a special collateral purpose for which the assignment was taken; but, if the transaction as described in the document was free from all taint of maintenance, the title of the assignee was absolute, and could not be impeached because he acted maliciously in contemplation of law in enforcing it. See *Stevenson* v. *Newnham* (1853) 13 C. B. 285, 22 L. J. C. P. N. S. 110, 17 Jur. 600; *Bradford Corporation* v. *Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 190, 60 J. P. 3. Without, therefore, attempting to grapple with the broader question whether at the time when that case was decided actions to recover debts had ceased to be a possible subject of maintenance, I think it binds us, and I am constrained to differ from the conclusion of the learned judge below, and to hold that the plaintiff is entitled to judgment. The appeal must be allowed.

[371] **Cozens-Hardy,** L.J., read the following judgment: This is an appeal from the judgment of Lawrance, J., in favor of the defendant. The plaintiff is the assignee of five debts amounting together to over 50*l.* due from the defendant to five

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creditors resident in Ireland. The assignment is effected by a deed dated October 13, 1904. It is in the common form of an absolute assignment, but there is no pecuniary consideration, and the assignee takes no beneficial interest, for he covenants that, in case he is able to recover the amount of the debts from the defendant, he will pay over to the assignors the respective amounts or so much thereof as he may be able to recover or realize after payment of all costs necessarily incurred by him. Now the existence of the debts is not disputed, and unless the plaintiff can recover the amounts the defendant has been relieved from all responsibility. It has, however, been strenuously contended by Mr. Gregory in his very able argument that the plaintiff's action is open to the objection of maintenance, or is otherwise such that on grounds of public policy the court ought to refuse its assistance. This view was adopted by the learned judge.

It is desirable to consider the limits of the doctrine of maintenance as applied to choses in action. There are undoubtedly many choses in action which are not and never were assignable either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance. It is plain that no court would allow the assignee of such a right to maintain an action. The instrument would be equally void at law and in equity. And an agreement by which a third person (not being within the recognized exceptions, such as that of master and servant) undertakes to institute or prosecute or assist the litigation in the name of the claimant, and to indemnify him wholly or partly against the costs of the litigation, is on principle open to precisely the same objection. If not technically maintenance, it savors of maintenance. This is well illustrated by Lord Eldon's judgment in *Wood* v. *Downes* (1811) 18 Ves. Jr. 120, 11 Revised Rep. 160, and by Lord Abinger's judgment in *Prosser* v. *Edmonds* (1835) 1 Younge & C. Exch. 481, 41 Revised Rep. 322. The case of *Harrington* [**372**] v. *Long* (1833–4) 2 Myl. & K. 590, 39 Revised Rep. 304 is inadequately reported, but it seems to me to be only another instance of the same principle. For the supplemental bill, in which the assignee and assignor were coplaintiffs, sought to set aside a deed of gift by the testator in favor of the defendant, and the assignment was executed and the deed of indemnity was given "solely for the purpose of enabling him"

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(*i. e.* the assignee) "to prosecute the original suit and to impeach the deed."

There are, however, other choses in action which, though not assignable at common law, were always regarded as assignable in equity. A debt presently due and payable is an instance. At common law such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was, with some exceptions which need not be referred to (see 1 Hawkins' Pleas of the Crown, p. 458), looked upon as open to the objection of maintenance. After a time the common-law courts recognized the right of anyone who had a pecuniary interest in the debt to sue in the name of the creditor. This, however, was the limit of their departure from the old strict rule, so far as I have been able to discover. But the courts of equity took a different view. *Row* v. *Dawson* (1749) 1 Ves. Sr. 331. They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident. They declined to hold such a transaction open to the charge of maintenance. Thus, in *Prosser* v. *Edmonds* (1835) 1 Younge & C. Exch. 481, at p. 491, 41 Revised Rep. 322, Lord Abinger says: "With respect to the question as to the validity of an assignment of a right to file a bill in equity" (*i. e.*, to set aside an alleged fraudulent deed), "I must distinguish between this sort of case and the assignment of a chose in action" (*i. e.*, a debt). And again: 1 Younge & C. Exch. at p. 496: "It was urged . . . that the assignee of a chose in action" (*i. e.*, a debt) "may file a bill in equity to [373] recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me that, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. . . . So, where a person takes an assignment of a bond, he has the possession; and, though a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it." A court of equity

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recognized not merely transactions which amounted to sales or mortgages of debts, under which the assignee took a beneficial interest in the debt, but also the creation of trusts, under which the trustee took no interest. Thus A, the creditor, might assign the debt to B, with or without a power of attorney, upon trust for C. Or A might simply declare himself a trustee of the debt for C. In either case the trustee would take no beneficial interest, and would, by virtue of his position as trustee, be entitled to be indemnified out of the moneys recovered against all costs of the action brought in the name of A against the debtor. If the debt were secured by a promissory note or bill or other negotiable instrument, A might deliver the instrument to B upon trust for C, and B could sue at law on it. Or A might create a trust in favor of himself by delivering the instrument to B upon trust for himself. It would, I apprehend, in this case be no objection to say that B had no interest in the debt. It has never, so far as I am aware, been suggested that a trustee to whom a debt is assigned is exposed to a charge of maintenance. Mortgages are every day dealt with in this fashion, including an assignment of the debt. From time to time particular classes of obligation have by statute been rendered assignable at law, and by the judicature act 1873, § 25, subsec. 6, any debt is made assignable at law by an absolute assignment in writing, of which notice is given to the debtor. Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods. And on principle I think it is not possible to deny the right of the owner of any property capable [**374**] of legal assignment to vest that property in a trustee for himself, and thereby to confer upon such trustee a right of indemnity. It is not easy to see how the doctrine of maintenance can be applied to a case like the present. The decision of this court in *Comfort* v. *Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. N. S. 656, 64 L. T. N. S. 685, 39 Week. Rep. 595, 55 J. P. 630, really proceeds upon this footing, and seems to me to be decisive of the present case. The court is not asked to exercise any discretionary jurisdiction. If the assignment is valid at all, it is valid in all courts, and the plaintiff is entitled to judgment *ex debito justitiæ*. The plaintiff is merely seeking by this action to recover payment of debts admitted to be justly

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due. It is said that the plaintiff does not really desire to be paid, and can take nothing for his own benefit under the judgment. For the reasons above stated I think this is of no moment. It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result. In my opinion this appeal must be allowed.

Mathew, L.J., agrees with this judgment.

Appeal allowed.

Solicitor for plaintiff: *Herbert Z Deane.*
Solicitors for defendant: *Leigh & Naish.*

Note.—Champerty: validity of assignment of debt as affected by nature of consideration, or by assignee's ulterior purpose.

Before proceeding to a consideration of the decisions bearing on the questions embodied in the title of this note, it seems proper to call the reader's attention to the fact that the courts are not agreed as to whether the champertous character of an assignment is available as a defense in an action upon the assigned claim. See note in 35 L.R.A.(N.S.) 512, on "Right of third persons to take advantage of champerty." Where, therefore, the champertous character of an assignment is not regarded as affecting the right of the assignee to maintain an action, a consideration of the present questions is unnecessary except as between the assignor and his assignee.

As affected by nature of consideration.

The conflict in the decisions hereinafter set forth is probably attributable to the liberalization which the ancient doctrine of champerty and maintenance has undergone at the hands of courts and legislatures since the earlier part of the 19th century.

Where a statute provides that "an open account of sums of money

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due on contract may be assigned, and the assignee will have the right of action in his own name," the assignment of such an account passes to the assignee the legal title to the account assigned, and champerty cannot be predicated thereon, although the assignee gave as the only consideration for it his obligation to pay the net proceeds of the action. *Knadler* v. *Sharp* (1873) 36 Iowa, 232.

In *Taylor* v. *Gilman* (1878) 58 N. H. 417, it was held that the transfer by indorsement of an overdue promissory note, with a discount of interest and with the understanding that if the note should not be collected the transferrer should return the consideration paid, was not champertous.

There is no public policy which forbids an assignment of a claim to a private individual for the purpose of collection. *Thornton* v. *Bell* (1914) 164 App. Div. 580, 150 N. Y. Supp. 39.

The fact that a claim is assigned for collection does not destroy its validity nor deter the holder from suing in his own name. *Falconio* v. *Larsen* (1897) 31 Or. 137, 37 L.R.A. 254, 48 Pac. 703.

In *Thompson* v. *Ide* (1859) 6 R. I. 217, where one against whom a judgment had been recovered obtained a transfer of a promissory note given by the judgment creditor to third persons, for the purpose of attaching thereon the amount which he might pay on the execution of the judgment against him, under a contract to bring suit thereon in his own name with the right to take to his own use, at the rate of 50 per cent, so much of the judgment he should recover as he might wish to use, and to transfer the balance of the judgment to the original payees of the note, it was held that the transfer was not void for champerty.

Though a statute requires that every action shall be prosecuted in the name of the real party in interest, it is no defense to an action on an assigned account that the transfer was only colorable as between the parties thereto. *Chase* v. *Dodge* (1901) 111 Wis. 70, 86 N. W. 548.

An assignment of a claim may be absolute so as to enable the assignee to maintain an action thereon in his own name under the provisions of subsection 6 of § 25 of the English judicature act 1873, though it may be in consideration of an agreement to pay out of the amount recovered such proportionate part thereof as should represent the individual debt due to the assignor. *Comfort* v. *Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. N. S. 656, 64 L. T. N. S. 685, 39 Week. Rep. 595, 55 J. P. 630.

On the other hand, in *Colville* v. *Small* (1910) 22 Ont. L. Rep. 33, affirmed on another ground in 22 Ont. L. Rep. 426, an assignment of a claim, by the terms of which the assignee was to sue and recover, and out of the proceeds first to pay costs, and then to divide what

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remained equally between the assignors and assignee, was held champertous.

And in *Stewart* v. *Welch* (1885) 41 Ohio St. 483, an agreement to assign a claim in consideration of a share of the recovery was held champertous.

An agreement to collect a note for another in consideration of being allowed one half of the amount collected was held to be illegal in *Byrd* v. *Odem* (1846) 9 Ala. 755.

So, also, in *Weakly* v. *Hall* (1844) 13 Ohio, 167, 42 Am. Dec. 194, it was held that an assignment of a claim to one not a lawyer, who agreed to collect it in the name of the assignor, to employ counsel, advance money, etc., reimburse himself for his allowances from the proceeds when collected, and receive a portion of the avails for his compensation, was champertous.

As affected by assignee's ulterior purpose.

See also under this head, *Thompson* v. *Ide, ubi supra.*

A decision very nearly parallel to that in FITZROY v. CAVE was made in *Bragg* v. *Raymond* (1853) 11 Cush. 274, where it was held it was no defense to an action on a negotiable promissory note that the holder bought it and commenced the suit with a design to injure, harass, and oppress the maker.

And in *Rucker* v. *Bolles* (1897) 25 C. C. A. 200, 49 U. S. App. 358, 80 Fed. 504, it was held that the sale of an interest in such judgment as the seller might recover in a pending lawsuit, which did not bind the purchaser to contribute anything toward the maintenance of the litigation nor obligate the seller to use the money which he had received in the prosecution of the suit, the only stipulation relating thereto being if the suit was compromised the purchaser should receive not less than a certain amount of money,—was not rendered unlawful by the circumstance that the purchase was made with the purpose of preventing a compromise and bringing the suit.

In *Wenar* v. *Leon L. Schwartz* (1907) 120 La. 1, 44 So. 902, it was held that a creditor of an insolvent may buy up claims of other creditors for the purpose of obtaining an order for the sale of property in block; and that the fact that this was done through an agent did not amount to a fraud upon the court. E. S. O.

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[ONTARIO COURT OF APPEAL.]

FORSTER v. IVEY.

(2 Ont. L. Rep. 480.)

Mortgage — Covenant — Release — Sale of equity of redemption.

When the land subject to mortgage is sold by the mortgagor, and the purchaser assumes and covenants to pay the mortgage, the mortgagor does not become to the mortgagee a surety in the technical sense, and the doctrines as to the discharge of sureties do not apply to him to their full extent. The mortgagor is liable, therefore, upon his covenant notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if when the liability is enforced the right of the mortgagor to redeem is not affected.

Judgment of a Divisional Court, 32 Ont. Rep. 175, affirmed, Osler and Maclennan, JJ.A., dissenting.

(September 21, 1901.)

An appeal by the defendant Ivey from the judgment of a Divisional Court, reported 32 Ont. Rep. 175, was argued before Armour, Ch. J. O., Osler, Maclennan, Moss, and Lister, JJA., on the 18th of March, 1901.

H. D. Gamble for the appellant.

D. W. Saunders and E. C. Cattanach for the respondent.

Armour, Ch. J. O.: The defendant, Ivey, being the owner in fee of the east half of lot number 14 in the 8th concession of the township of Walpole, conveyed same by way of mortgage on the 7th of January, 1887, to the accountant of the Supreme Court for securing the sum of $3,000 and interest, and covenanted with him that he would pay the mortgage money and interest at the times specified in the said mortgage.

The defendant, Ivey, thereafter, on the 14th of February, 1889, conveyed the said mortgaged land to one Alexander Gracey, in fee, subject to the said mortgage.

By this last-mentioned conveyance, the defendant, Ivey, ceased to have any interest in the equity of redemption of the said land and thereby lost his right to redeem the said land.

His only equity then was to compel his vendee, Alexander

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Gracey, who took subject to the mortgage, to pay it off as fast as the mortgage money and interest fell due.

On the 1st of May, 1890, the mortgagee assigned the said mortgage, and the land thereby mortgaged, and the mortgage [481] money thereby secured, and all the covenants therein contained, to the plaintiff.

And on the 22d of December, 1894, the said Alexander Gracey conveyed the said mortgaged land to one Alfred Gracey, in fee, subject to the payment of the said mortgage.

The mortgage money fell due on the 10th of January, 1895, and I find that the plaintiff for good consideration extended the time for the payment of the said mortgage money by Alfred Gracey until the 10th of January, 1896.

On the 18th of July, 1898, the defendant, Ivey, assigned his right to compel Alexander Gracey to pay the mortgage money and interest to the plaintiff.

And on the 13th of September, 1898, this action was brought against the defendant, Ivey, on his covenant contained in the said mortgage.

The extension granted by the plaintiff to Alfred Gracey of the time for the payment of the mortgage money above mentioned is insisted upon as discharging the defendant, Ivey, from the obligation of his covenant, but I do not think that he could complain of this, for, at the time during which this extension was granted, he had no right to redeem, and it was only the bringing of this action which gave him a right to redeem,—a new right, having lost his former right by conveying his equity of redemption to Alexander Gracey.

This action being brought against the defendant, Ivey, on his covenant, his only equity then was, on payment of the money recoverable from him upon his covenant, to have a conveyance of the mortgaged land unaffected by any act of the plaintiff and subject to such equity of redemption as might be subsisting in any other person, and the evidence shows that the plaintiff at the time this action was brought was in a position to make such reconveyance.

The judgment will be varied by providing that upon payment of the judgment herein, and contemporaneously with such payment, the plaintiff shall reconvey the mortgaged land to the de-

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fendant, Ivey, unaffected by any act of the plaintiff and subject to such equity of redemption as may be subsisting in any other person. I refer to 2 Equity Cas. Abr. 605; *Lomax* v. *Bird* [482] (1683) 1 Vern. 182; *James* v. *Biou* (1818) 3 Swanst. 234, 19 Revised Rep. 200, 18 Eng. Rul. Cas. 166; *Kinnaird* v. *Trollope* (1888) 39 Ch. D. 636, 57 L. J. Ch. N. S. 905, 59 L. T. N. S. 433, 37 Week. Rep. 234.

In my opinion the appeal should be dismissed, with costs.

Moss, J.A.: Falconbridge, J., at the trial, based his judgment in favor of the plaintiff upon three grounds: (1) That no binding agreement for an extension of time to Alfred Gracey was established; (2) that in any event the defendant, Ivey, did not occupy such a position of surety as to entitle him to avail himself of the defense of extension of time to Alfred Gracey; and (3) that there was in the plaintiff's dealings with Alfred Gracey a reservation of rights against the defendant, Ivey. In the Divisional Court the first point was not expressly dealt with, but the judgment was affirmed on the second of the above grounds, assuming that a binding agreement for extension was proved. This made it unnecessary to consider the third ground.

Upon the argument before this Court the question chiefly discussed was whether the view upon which the Divisional Court proceeded was right.

The circumstances of the case are somewhat peculiar, and I have no desire to decide anything beyond what the facts require. I am strongly inclined to the view that the learned trial judge rightly held that no binding agreement for extension was made with Alfred Gracey. [The learned judge referred to the evidence and continued:]

But giving these dealings their fullest effect in favor of the defendant, Ivey, what advantage can he take of them as an answer to the plaintiff's demand on his covenant?

Alfred Gracey made no further payment on account of either principal or interest. When this action was commenced the alleged extension had long expired, and there was nothing in fact to prevent the plaintiff from reconveying the mortgaged premises to the defendant, Ivey, or assigning the mortgage to his nominee upon payment of the amount due under it for principal and

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interest. But the defendant, Ivey, contends that he stands released from all liability under his covenant. If this be so, it must be because the plaintiff has elected to look to the security of the mortgaged premises alone, for he has gained no other debtor to whom he can look in substitution for the defendant, [483] Ivey. He must be deemed to have accepted the security given for the debt in lieu of the debtor's promise to pay and the security for the debt. In order to see whether this result has been reached it is necessary to consider the position of mortgagee and mortgagor, first while the latter continues to hold the mortgaged premises; and, secondly, after he has parted with them to a purchaser who becomes either by agreement with him or by force of law liable to indemnify him against payment of the mortgage debt.

A mortgagee holding a covenant by his mortgagor to pay the debt is under no obligation to resort to any one of his remedies in preference to another. He may sue on the covenant and obtain judgment for the payment of the debt. Or he may institute an action for foreclosure of the equity of redemption without claiming payment under the covenant. In the one case he is looking to the person of his debtor; in the other he is looking to the mortgaged estate. Or he may institute a proceeding to recover on the covenant and at the same time foreclose or sell the mortgaged premises. Against any of these methods of proceeding a mortgagor in default can maintain no objection, except, perhaps, as to the matter of costs under some circumstances. But he can only restrain or prevent the proceedings by payment of the debt. In case of payment he is entitled to a reconveyance of his estate, "and the mortgagee is charged with the duty of making such reconveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt." *Walker* v. *Jones* (1866) L. R. 1 P. C. 50, at p. 62. He may under the statute have an assignment of the mortgage to a third party if he prefers it. Now in what respect, if at all, is a mortgagee's position altered when his mortgagor conveys the equity of redemption to a purchaser? No privity is thereby created, and the mortgagee does not gain the personal responsibility of the purchaser.

On the other hand no change is made in his relation towards

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the mortgaged premises. He is not obliged to treat them as the primary security, and the mortgagor's covenant as the secondary security.

[484] He may still exercise his choice as to whether he will proceed against each separately or against both together. As to him, the mortgagor is in the position of a debtor who is still liable to pay when called upon without being entitled to compel the mortgagee to resort in the first instance to the security of the land. He cannot call upon the mortgagee to enter into possession of the mortgaged premises or deal with them by sale or otherwise in order that he may be relieved upon his covenant.

No doubt if the mortgagee enters into possession of or deals with the mortgaged premises he must account for his dealings, and the mortgagor if called upon to pay is entitled to the benefit of the account, but the same thing would occur if the possession were taken or the dealing had while the mortgagor continued the owner of the equity of redemption. The mortgagee's position is not altered in any respect by the mortgagor parting with the equity of redemption. He has still the same debtor and the same security, and he owes to the mortgagor the same duties that he previously owed, and no others. But the mortgagor by parting with the equity of redemption changes his relation to the mortgagee to the extent that he is no longer entitled to redeem as of course. The equity and right of redemption he has vested in another. And unless and until the mortgagee calls upon him to pay under his covenant, he has not the right to require the mortgagee to receive the money from him and to reconvey the estate or assign the mortgage to a third party for him. In *Kinnaird* v. *Trollope* (1888) 39 Ch. D. 636, 57 L. J. Ch. N. S. 905, 59 L. T. N. S. 433, 37 Week. Rep. 234, it was conceded in argument, as stated by Stirling, J., at p. 642, that, where the mortgagor has assigned absolutely his equity of redemption in the mortgaged property, so long as the mortgagee abstains from suing, the mortgagor cannot bring an action to redeem; and further, that, if the mortgagee chooses to assert his right to foreclose, the mortgagor is not a necessary party to the foreclosure action. If he is not a necessary party to a foreclosure action it must be because he is not entitled to redeem. Otherwise the action would be imperfectly constituted as regards parties, and the foreclosure

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proceedings would not confer an absolute irredeemable title. But if, instead of foreclosing merely, the mortgagee resorts to the covenant for payment, then a right to redeem arises. I entirely agree with the [485] statement of the law made by Stirling, J., in *Kinnaird* v. *Trollope,* at p. 645, as follows: "I think, therefore, that a mortgagor who has entirely parted with the equity of redemption nevertheless acquires, upon being sued by a mortgagee, a new right to redeem, in the same way as a mortgagor who has been absolutely foreclosed acquires, upon being sued, a new right of redemption." It follows that upon redeeming, the mortgagor would be entitled to a reconveyance of the estate as remarked by Stirling, J., and as laid down in *Palmer* v. *Hendrie* (1859) 27 Beav. 349. Sir John Romilly, M.R., said (p. 351): "The mortgagee has a right to make use of all of his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage money has been fully paid he is bound to deliver over the mortgaged estate to the mortgagor."

What, then, is required of the mortgagee when he sues his mortgagor on the covenant? It is that he shall be in a position to deliver over the mortgaged estate to the mortgagor upon payment by him.

In the present case that was the position when the action was commenced, and is still the position. The plaintiff has never been in possession, and is not liable for rents and profits or for depreciation. The property has been used and dealt with by Alexander Gracey, to whom the defendant, Ivey, sold, and by Alfred Gracey, who purchased from Alexander.

The plaintiff can make a reconveyance of the estate, or discharge the mortgage, or assign it to a third party for Ivey's benefit. But the latter says that because of the alleged agreement for extension until January, 1896, there was a time during which the plaintiff could not have reconveyed or assigned to him the estate or mortgage untrammeled by the agreement with Alfred Gracey, and that being so the plaintiff cannot now sue on the covenant although he is in a position to restore the estate.

Such a conclusion could only be arrived at by a rigid application of the most rigid rules applicable to the relation of principal and surety. And with great deference I am of the opinion that they are not applicable to a case like the present.

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If the inquiry be made, how did the parties reach the position in which the mortgagee, the creditor, finds himself obliged [486] to regard the mortgagor, whose covenant he holds, as merely a surety instead of his principal and only debtor, considerable difficulty must be found in answering it. I have already pointed out that at the outset the mortgagor is primarily liable, and, in every sense of the word, the principal debtor, the land being the pledge for his debt. What is the process by which, on the transfer of the equity of redemption to a purchaser to which the mortgagee is no party, the land becomes primarily liable, and the mortgagor is put in a position to claim as against the mortgagee the rights of a surety? He is not surety for the purchaser, because the latter is not in any way liable to the mortgagee. There is no principal debtor liable to the creditor, and as the obligation of sureties is accessory to that of a principal debtor it follows that it is of the essence of this obligation that there should be a valid obligation of a principal debtor. De Colyar, 3d ed. p. 210.

It is, of course, not necessary to the relation of principal and surety that as between them and the creditor the one should be primarily, and the other secondarily, liable. Both may be equally liable to the creditor, who may nevertheless be bound to accede to one all the rights of a surety. But there must be an obligation or liability on the part of both to the creditor in order to the creation of the relationship. One cannot be surety for the debt of another unless that other is himself liable as debtor. In all the three kinds of cases specified by Lord Selborne in *Duncan Fox & Co.* v. *North and South Wales Bank* (1880) 6 App. Cas. 1, 50 L. J. Ch. N. S. 355, 43 L. T. N. S. 706, 29 Week. Rep. 763, 4 Eng. Rul. Cas. 591, where the relationship of principal and surety subsists, there is found the element of liability of both principal and surety to the creditor. As stated by Lord Selborne, they are (p. 11): "(1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability

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of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled [487] to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid."

None of these fits the present case, and I am not aware of any English decision in which it has been laid down or suggested that the principles applicable to the relationship of principal and surety can be applied to a creditor who has not the obligation or liability of both to look to. Expressions are to be found in some Ontario cases which appear to favor the notion, but the express decisions are in the opposite direction.

In *Aldous* v. *Hicks* (1891) 21 Ont. Rep. 95, the learned Chancellor had to deal with a case where, upon facts resembling those in this case, it was contended that the mortgagor was released from liability upon his covenant. The Chancellor pointed out that though there was a purchaser of the equity of redemption who covenanted to pay the mortgage, and so became primarily liable for the mortgage debt as between her and the mortgagor, no privity of contract was created between her and the mortgagee, and that there was, therefore, at the outset an absence of the threefold relation of creditor, principal, and debtor and subsidiary debtor or surety, upon which the equitable doctrine involved could operate.

In *Barber* v. *McCuaig* (1897) 24 Ont. App. Rep. 492, the learned Chancellor and Ferguson and Meredith, JJ., sitting as a second division of this court, dealt with a defense founded upon the proposition that the mortgagor, upon transferring his equity of redemption to a purchaser who agreed with him to pay the mortgage debt and indemnify him against all claim for it, became a surety and the purchaser became the principal debtor. The court negatived that contention. The decision was reversed by the supreme court (1898) 29 Can. S. C. 126, but, as pointed out by Meredith, Ch. J., in *Barber* v. *McCuaig* (2) (1900) 31 Ont. Rep. 593, that court did not dissent from the view of the second division but adopted it. It is clear from a perusal of the judgment of Mr. Justice Gwynne that the supreme court was not of the opinion that the dealings of the mortgagee with the purchaser of the equity of redemption, which involved extending

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the time for payment of the mortgage money, operated as a discharge of the mortgagor upon his covenant for payment. There was at most a suspension of the remedy.

[488] And as it appears from the later report the mortgagee finally succeeded against the mortgagor. In *Watson* v. *Bell* (1895) now reported as an addendum to the report of the opinion of Meredith, J., in this case (32 Ont. Rep. 181), the question appears to have been whether the giving of time for payment of a mortgage to a purchaser of the equity of redemption discharged the mortgagor from liability upon his covenant.

There is a full discussion of the question whether the mortgagor thus became a surety and entitled to all the rights accorded by the law to one in that position. The decision was adverse to the mortgagor's contention.

In my judgment these decisions correctly state the law which should govern in this case. *Mathers* v. *Helliwell* (1863) 10 Grant, Ch. (U. C.) 172, has been much discussed. If it is to be taken as going the length of deciding that a mortgagor who has conveyed his equity of redemption, taking a covenant to pay off the mortgage, becomes a surety or subsidiary debtor to the mortgagee, and entitled to all the rights of a surety against him, I think, with submission, that it goes too far, and is not in accord with the trend of modern decisions.

But if by contract or arrangement the defendant, Ivey, assumed the position of surety towards any person, it was towards Alexander Gracey. It is against him that he could enforce the right of reimbursement or indemnity in the event of being obliged to pay, and that is not impaired by the plaintiff's dealings with Alfred Gracey. This person never even stood towards the defendant, Ivey, in the relation of one who either expressly or by implication engaged to pay off his debt or indemnify him against his liability upon his covenant. The doctrine of discharge of a surety by giving time to the principal could not be made applicable, for Alfred Gracey could never be considered the principal debtor. The situation cannot be more aptly described than in the language of my brother Maclennan in *Trust and Loan Co.* v. *McKenzie* (1896) 23 Ont. App. Rep. 167, at p. 170: "The present case is therefore not a case of suretyship at all within the decisions as to discharge of surety by dealings with-

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out his consent between the creditor and principal debtor. It is really only a case of indemnity. McKenzie, the mortgagor, sold the property to Franklin, subject to the mortgage, and took [489] a covenant from him to pay it. Franklin did not, by that purchase, become a debtor to the plaintiffs, and so did not become a surety for McKenzie; he simply became bound to indemnify McKenzie, and to relieve him from paying the mortgage by paying it himself. That covenant of Franklin's still remains in full force, and has never been interfered with in any way by the plaintiffs. Then Franklin sold to Isabella McLaughlin, subject to the mortgage. It is not said that she covenanted to pay it, so that her liability to do so was an implied and not an express liability; and Mrs. McLaughlin, no more than Franklin, did not become a debtor to the plaintiffs."

It has been suggested that the mortgaged premises should be treated as the primary security and, in that sense, the principal debtor. It was, of course, competent for the parties to so agree at the outset, or perhaps afterwards upon good consideration. But I am not aware of any principle which enables the mortgagor and a purchaser from him of the equity of redemption, by arrangement between them, to so alter the rights of the mortgagee as to compel him to regard the land as the primary security.

The mortgagor, having of his own will parted with his equity of redemption, must, when by action brought against him on his covenant he is restored to his right to redeem, be content if the mortgagee is in a position to restore him the mortgaged premises.

Some reliance is placed on *Gowland* v. *Garbutt* (1867) 13 Grant, Ch. (U. C.) 578. The suit was for the administration of the estate of one William Knaggs, deceased, and the claim in question was made by one James Thompson upon a mortgage held by him upon the lands of one George Knaggs. After the execution of the mortgage, George Knaggs had sold and conveyed 20 acres of the mortgaged premises to one William James, with whom he covenanted for freedom from encumbrances and to indemnify the 20 acres against Thompson's mortgage. In order, further, to secure James against the Thompson mortgage, the deceased, William Knaggs, executed a bond in his favor, conditioned for holding him harmless in respect of it.

There were various dealings by Thompson with the remainder

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of the mortgaged premises, the result of which was, [490] as it was found, that Thompson had released the 20 acres from his mortgage, and that, therefore, the estate of William Knaggs was relieved from liability under his bond to William James. It is apparent that the case was not one in which the mortgagor was claiming to the relieved from his covenant to Thompson, but the question was whether the mortgagor's surety had been discharged from liability to William James through Thompson's dealings with the mortgaged premises.

In noticing some of the arguments advanced in support of Thompson's claim against the 20 acres, Mowat, V.C., said (p. 583): "The learned counsel for the appellant stated, I think, that he was authorized by Nicol to say that on payment of the mortgage money by James he would convey to him unconditionally the property. But assuming this to be so, mortgaged property cannot be redeemable or irredeemable from time to time, and the mortgage debt discharged, and revived, at the mere pleasure of the mortgagee and those claiming under him." This must be read with reference to the circumstances and in the light of the next sentence on the same page. The Vice Chancellor continues: "The right to foreclose" [that is, as I understand it, the right to foreclose the 20 acres in respect of which William Knaggs was surety, but which had been held to be released from Thompson's mortgage] "once gone is, I apprehend, gone forever; and when it is considered that William Knaggs was a mere surety and that William James was in effect a surety (his land having been subject to the mortgage debt at the time of his purchase, but the seller [*i. e.*, the mortgagor, George Knaggs] having agreed to pay off the mortgage), it is too plain for argument that the liability of both William Knaggs and William James, if suspended by the sale to Nicol, cannot possibly be revived afterwards without their consent, even if the position of a mortgagor who was the principal debtor, and not a surety, would be different." And it is to be observed that the earlier *dictum* was questioned by Spragge, C., in *Munsen* v. *Hauss* (1875) 22 Grant, Ch. (U. C.) 279 at p. 285.

In my opinion the appellant fails and the judgment should be affirmed.

Lister, J.A.: I agree with the judgment just read.

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[491] **Osler, J.A.:** I think for the reasons given by my brother Maclennan, whose judgment I have had an opportunity of reading, that the appeal should be allowed.

Maclennan, J.A.: The facts are simple. Mortgage by defendant, Ivey, to plaintiff, 7th January, 1887, due 7th January, 1895. Conveyance by Ivey to Alexander Gracey, 14th February, 1889. Mortgage debt to be paid by Gracey. Sale and conveyance by Alexander Gracey to his son Alfred Gracey, 22d December, 1894, in consideration of the mortgage debt. An agreement between plaintiff and Alfred Gracey without the knowledge or consent of Ivey, 23d May, 1895, to extend the mortgage till the following January, on payment of arrears of interest and insurance premium. Arrears of interest and insurance premium paid accordingly on 3d June, 1895, by Alfred Gracey. Assignment, 18th July, 1898, Ivey to plaintiff of his right of action against Alexander Gracey for indemnity against the mortgage debt. Action commenced 13th September following against Ivey and Alexander Gracey. Alfred Gracey not made a party. Alexander Gracey made no defense, and Ivey's defense, the extension of time granted to Alfred Gracey, without his knowledge or consent. It ought also to be stated that the extension of time was granted by the plaintiff with full knowledge that the assignments of the equity of redemption were both made subject to payment by the respective assignees of the mortgage debt.

No case precisely like the present has been cited to us, nor have I been able to find any; and the appeal must therefore be decided on principle. And I am of the opinion that on well-settled principles our judgment must be for the appellant.

There are two principles from which that result must follow.

The first is that by which where a mortgagee has put it out of his power to restore the mortgaged property to the mortgagor on payment of the debt he will be restrained by a court of equity from suing upon the covenant.

The other is the principle upon which a creditor is prevented from suing a surety after he has given time to the defendant debtor without reserving his remedy against surety. *Perry* v. *Barker* (1806) 13 Ves. Jr. 198, 9 Revised Rep. 171, was a case

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in which after [492] foreclosure and sale for less than his debt the mortgagee sued on the covenant for a deficiency. The action was restrained by a perpetual injunction. But Erskine, Lord Chancellor, said he thought if there was any probability that the mortgagee could get the estate back again he ought to have a time limited for that purpose.

The opinion of Lord Chancellor Erskine has not been followed. In *Lockhart* v. *Hardy* (1846) 9 Beav. 349, 15 L. J. Ch. N. S. 347, 10 Jur. 532, 18 Eng. Rul. Cas. 434, Lord Langdale referred to that case and a similar case of *Tooke* v. *Hartley* (1786) 2 Bro. Ch. 125, before Lord Thurlow, as having left the matter in great obscurity, and said he thought it would be altering the nature of the contract between the parties, and giving the mortgagee the benefit of a trust for sale with a bond or covenant for the deficiency, instead of a mortgage bond or covenant. He thought such was not the law, and proceeded upon this that in equity the mortgagee is bound to restore the estate on full payment of the debt, and that having sold the estate and thereby disabled himself from restoring it, he is not in a condition to demand payment of the whole debt, which he does when he sues on the bond.

In *Palmer* v. *Hendrie* (1859) 27 Beav. 349, Romilly, M.R., said (p. 351): "If it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, the court will interfere and prevent the mortgagee suing the mortgagor at law." That was said on a motion for an interim injunction. The judgment at the hearing of the same case is reported in (1860) 28 Beav. 341, when the injunction was made perpetual.

In *Walker* v. *Jones* (1866) L. R. 1 P. C. 50, Turner, L.J., delivering the judgment of the court, says (p. 61): "It is also clear that every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such reconveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative position of the parties, the mortgage being only a security for the debt." In the same case Sir Hugh Cairns, counsel for the

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mortgagor, stated the principle to be "that a mortgagee should [493] be in a condition to return the mortgaged property *in statu quo ante* when paid the debt, and that if he cannot do that he will not be allowed to proceed for the debt on any other security he may have."

In *Trust & Loan Co.* v. *McKenzie* (1896) 23 Ont. App. Rep. 167, we had the same point before us, and the majority of the court were of the opinion that but for the reservation of rights made by the mortgagees an extension of time for two years, without the consent of the mortgagor, given to the assignee of the equity of redemption for payment of the mortgage debt, would have discharged the mortgagor. I quote from the judgment, pp. 173–4: "But being the owner of the land, such an agreement (*i. e.*, for extension of time), without some stipulation to the contrary, would give Treblecock a right against the plaintiffs and all the world to be free from foreclosure proceedings until the expiration of the extended time for payment. Therefore, if McKenzie, being sued on his covenant, and being compelled to pay, and having obtained a reconveyance or assignment of the mortgage, according to his undoubted rights, sought to obtain repayment by suit against the mortgaged lands, he would be met by the agreement for an extension of time made between the plaintiffs and Treblecock. By agreement between the mortgagees and the owner, the land has been tied up for two years, and the mortgagor's right to resort to the land for payment has been destroyed. His right was a right to immediate indemnity, and that right is now gone by the act of the mortgagee. The mortgagee has, therefore, by his agreement with the present owner, made his mortgage unredeemable by the mortgagor according to the terms, and the effect of that must be to discharge the mortgagor from liability altogether. The mortgagor's liability on his covenant, and his right to have the mortgage estate restored to him upon payment, are reciprocal, and if the mortgagee cannot restore the estate in its integrity, save so far as any impairment was warranted by the terms of the mortgage itself, such a sale of part of the land under a power, etc., then he cannot enforce the debtor's covenant, his liability is gone." The learned Chancellor appears to have misunderstood this judgment, which was the judgment of the majority of the court, and plainly

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proceeded on this, [494] that the mortgagor would have been discharged by the extension of time given to the assignee of the equity of redemption but for the reservation of rights by the mortgagees. That was the *ratio decidendi*. My learned brother Osler gave no judgment in the case, but was of the opinion that it was a case of suretyship, and that the defendant was discharged by the giving of time, the reservation in his opinion not being sufficient. The only difference between that case and the present is that there the extension was for two years, whereas here it was only for seven months; and that in that case there was a reservation of rights, while in this case there was none.

It seems obvious that the mere duration of the extension of time can make no difference in such a case, any more than in a case of suretyship. The important circumstance in both kinds of cases is that rights of the debtor, indeed all his rights, are absolutely destroyed for a longer or shorter time, without his consent. His right was to pay, with a correlative right to resort to the land for indemnity. His right was to compel Alexander Gracey to pay, and both these rights no longer exist. If the mortgagee could extend the time for seven months or two years, he could equally do so for ten or twenty or a hundred years. It may be said that the debtor could make a tender of the money, and demand a reconveyance, and that if refused he would be free from the debt after that. But such a tender would be useless while the extension of time continued, for he would not be obliged to take a reconveyance with his remedy by foreclosure suspended. A tender under such circumstances would be a vain form. It is clear that if after foreclosure the mortgagee sell the land, the mortgagor is free forever, even if the mortgagee should buy it back again, and the same principle must be applicable to an extension of time, otherwise the debtor's rights would be intermittent at the will of the mortgagee.

This is not new doctrine in our courts. In *Mathers* v. *Helliwell* (1863) 10 Grant, Ch. (U. C.) 172, Vankoughnet, C., applied it in a case where the mortgagee, in consideration of the assignee of the equity of redemption agreeing to pay the mortgage debt, extended the time for payment for five years. He says (p. 175): "Helliwell (the assignee) undertook with her (the mortgagor) [495] to pay off the mortgage money which she had

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contracted to pay. Her equity was to compel him to do this and relieve her. Behind her back the mortgagee agrees with him that this money shall not be exacted for five years, on certain terms. Her equity is to compel Helliwell to pay off the mortgage. The mortgagee, without her assent, binds himself that Helliwell shall not be compelled to do this, and that he will not receive it for five years beyond the time the money is payable, and agrees with him that it shall be expressly charged on the land. I think that in the face of this agreement he can no longer insist on any personal liability of Mrs. Townsley." The Chancellor thinks that case merely decides that pending the arrangement for the five years' extension which was current when the action was brought, it was not competent to make an immediate collection of the mortgage money from the mortgagor. I do not think the case admits of that view being taken of it. The five years' extension was merely of the principal money. There was no extension of time for payment of interest. The prayer of the bill was for payment of the whole debt, as well as interest, and such is the decree, which I have examined; so that the extension must have been regarded as lost by nonpayment of the interest, and was not current when the action was brought.

In *Gowland* v. *Garbutt* (1867) 13 Grant, Ch. (U. C.) 578, where a mortgagee had put it out of his power to reconvey a part of the mortgage property, but had afterwards obtained an agreement to have it back, Mowat, V.C., held that the mortgagor's liability was not thereby restored. He said (p. 583): "Mortgaged property cannot be redeemable and irredeemable, from time to time, and the mortgage debt discharged and revived at the mere pleasure of the mortgagee and those claiming under him. The right to foreclosure once gone is, I apprehend, gone forever."

But I am also of the opinion that the appellant was, to the knowledge of the respondent, a surety for the mortgage debt when the extension of time was given to Alfred Gracey, and he is discharged on that ground.

It is now settled that a creditor is bound to regard a suretyship which comes to his knowledge, although it may have arisen after the debt has been contracted (*Rouse* v. [496] *Bradford Banking Co.* [1894] A. C. 586, 63 L. J. Ch. N. S. 890, 6 Re-

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ports, 349, 71 L. T. N. S. 522, 43 Week. Rep. 78, 21 Eng. Rul. Cas. 650); and the only question is whether this is a case of suretyship, although Alfred Gracey the owner of the land was not personally liable to the mortgagee for the payment of the debt.

I think it is, and I adopt the conclusion and the reasoning on the point of my brother Osler in *Blackley* v. *Kenney* (1890) 29 Can. L. J. at pp. 110, 111. Suretyship may be either by personal obligation as by bond, covenant, etc., or it may be by mortgage or pledge of property, without direct personal liability. What possible difference can it make whether it be one or other? In either case the surety stands to lose either money or property, to a certain amount, if the principal do not pay. And his great concern is to take care that the principal do pay. Now, if a creditor have one man's covenant and another man's property, for the same debt, either one or other may, as between themselves, be the one who ought to pay, and I think it plain it is quite as much a case of suretyship in the one case as in the other. Therefore, although Alfred Gracey was not personally liable to the respondent for the debt, and the appellant was, yet inasmuch as the respondent had Gracey's land and Gracey was the one who ought to pay, the latter was a principal and the appellant a mere surety.

The reasoning of Lord Loughborough in the leading case of *Rees* v. *Berrington* (1795) 2 White & T. Lead. Cas. in Eq. 7th ed. at p. 571, is just as applicable to a case of this kind as to the ordinary case of suretyship by contract. He says: "Suppose a bond payable in six months, with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. . . . The obligee thinks fit totally to change the nature of the security and the credit; . . . and, doing this, he does this material injury to the surety; he has a right the day after the bond is due, to come here and insist on its being put in suit; the obligee has suspended that till the time contained in the notes runs out. Therefore, he has disabled himself to do that equity to the surety which he has a right to demand. . . . The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obli-

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gation in conscience and honesty." [497] In *Craythorne* v. *Swinburne* (1807) 14 Ves. Jr. 160, 21 Eng. Rul. Cas. 636, Sir Samuel Romilly, *arguendo,* p. 162, said: "The whole doctrine of principal and surety, with its consequences of contribution, etc., rests upon the established principle of a court of equity; not upon contract; except as it may be so represented upon the implied knowledge of those principles." And this statement was approved of by Lord Eldon, p. 169, he saying that the jurisdiction assumed by the courts of law rests on the universal acknowledgment of the principle of equity.

In *Samuell* v. *Howarth* (1817) 3 Meriv. 272, Lord Eldon says again: "The liabilities of sureties are governed by principles which have long been settled in equity and are now adopted in courts of law. I say now, because the Court of Common Pleas formerly held a different doctrine. . . . The surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract."

In *Polak* v. *Everett* (1876) 1 Q. B. D. 669, Lord Blackburn says (p. 673): "It has been established for a very long time, beginning with *Rees* v. *Berrington* (1795) 2 Ves. Jr. 540, to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even possibly benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether."

In *In re Sherry* (1884) 25 Ch. D. 692, Lord Selborne says (p. 703): "It is an equity which centers into our system of law, that a man who makes himself liable for another person's debt is not to be prejudiced by any dealings, without his consent, between the secured creditor and the principal debtor.

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[498] Now the rights of the parties in this case as between themselves are partly legal and partly equitable. They are unquestionable in the nature of suretyship rights, and I think we are compelled to apply to them the equitable principles applicable to such rights. I will suppose the case of a man buying an annuity, say $1,000 a year, for five years, charged upon land. It is a mere charge, without anyone being personally liable for it, as often happens. The purchaser refuses to buy without the bond or covenant of a surety, for its due payment, and he gets it. He then by agreement with the landowner, and without the knowledge or consent of the surety, extends the time of payment of the annuity. Would it not be an extraordinary thing to say that it was not a case of suretyship, and that the surety was not discharged? If it would, how does that case differ from the present?

Again, I will suppose that under the old law, a married woman mortgaged her land for a loan, with a surety. She could not make herself personally liable by covenant, but would not time given to her discharge the surety?

In *Robinson* v. *Gee* (1749) 1 Ves. Sr. 251, Lord Hardwicke says: "It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband; after the husband's death she is entitled to have her real estate exonerated out of the personal and real assets of the husband; the court considering her estate only as a surety for his debt."

In *Hodgson* v. *Hodgson* (1837) 2 Keen, 704, 7 L. J. Ch. N. S. 5, a married woman had charged her separate estate, as a surety, to one of two other sureties for a debt of her husband, who, as between themselves, had mutual rights of contribution. The plaintiff, to whom the lady was surety, released her cosurety from her right of contribution, and it was held by Lord Langdale to that extent the lady's estate was discharged.

In *Royal Canadian Bank* v. *Payne* (1872) 19 Grant. Ch. (U. C.) 180, Mrs. Payne, a married woman, appointed her separate estate by way of mortgage as security to the extent of $800 for goods to be supplied to her son. Spragge, C., held the mortgage to have been discharged on two grounds, one of which was time given to the debtor.

[499] It follows from these cases, I think, that to constitute

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a case of suretyship, to which the rule of discharge by giving time applies, it is not essential that the liability of either the principal or the surety should be a personal liability. Either or both may be a liability of property only. One married woman might be surety for the debt of another married woman, both liabilities being in respect of the separate estate alone, without any personal liability. And in my opinion no good reason can be suggested why in such a case the equitable principle ought not to be applied, and the surety be held to be discharged by time given to the principal debtor, just as it would if both were personally liable.

I do not think the case is affected by the judgment of the supreme court of *McCuaig* v. *Barber* (1898) 29 Can. S. C. 126, which dismissed the action, just as Falconbridge, J., had done at the trial.

I therefore think the appeal should be allowed and the action dismissed, with costs here and below.

Appeal dismissed, **Osler** and **Maclennan**, JJ.A., dissenting.

Note.—Liability of original mortgagor or intermediate grantee who has assumed the mortgage, as affected by extension of time given his grantee by the mortgagee.

I. Where the grantee has assumed the mortgage, 633.
II. Where the grantee has not assumed the mortgage, 646.

I. Where the grantee has assumed the mortgage.

The majority view.

The question decided by the Ontario court of appeal in FORSTER v. IVEY is one upon which the courts of the United States have differed. All agree that where the purchaser of mortgaged premises assumes or covenants to pay the mortgage, the effect of the transaction as between the parties themselves is to put the seller in the position of a surety to the extent that, if he is obliged to pay the mortgage debt himself, the mortgage is not thereby extinguished, but he becomes subrogated to the right of the mortgagee to enforce the security. They further agree that the assumption of the mortgage does not of itself have the effect to render the grantee the principal debtor and the grantor the surety so far as the mortgagee is concerned, but that he may continue to look to the grantor alone as his debtor. Beyond this point agreement ceases. According to one view,

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the mortgagee may treat both the original mortgagor and his grantee as principals; the result being that to grant an extension of time to the latter will not operate to discharge the former. According to the other view, the mortgagee cannot recognize the purchaser's liability to him at all without at the same time recognizing it as it really and in fact exists at the time as between the vendor and the purchaser. It has even been said (see *Nelson* v. *Brown* (1897) 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; *Regan* v. *Williams* (1905) 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; *Citizens' Bank* v. *Douglass* (1914) 178 Mo. App. 664, 161 S. W. 601) that after receiving notice of such assumption of the debt, he is bound to recognize the suretyship and to respect the rights of the surety in his subsequent dealings with the parties. From this view it follows that an extension of time granted to the purchaser of the mortgaged premises without the consent of the mortgagor, or an intermediate grantee who has assumed the mortgage, will, if based upon sufficient consideration, so as to be legally binding, operate to release the latter. In *Merriam* v. *Miles* (1898) 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861, it is said: "Of course there can be no change without the knowledge and consent of the mortgagee which can affect his rights. He need not look at all to the vendee unless he so elects. He need surrender no rights against the vendor unless he so elects; but it by no means follows that because he is not contractually bound by the contract between them, he may, after learning thereof, enter into new relations with one of the parties, in disregard of the rights of the other. He may enforce his rights as they before existed, but if he undertakes, after notice of the changed relationship between the other parties, to deal with one of them by changing his own contractual obligations with him, he must regard the rights which he knows the third person has acquired. The rule which releases a surety, when the creditor, without the surety's consent, enters into a valid contract extending the time of payment, is founded on equitable considerations, and does not arise from an implied provision of the original contract. Where the relationship is, or has become, that of principal and surety, the duty to regard the surety's rights exists, although the creditor may himself sustain such a relationship that in enforcing his own rights he may treat both as principals."

It is not necessary that the mortgagee know that an intermediate grantee of the premises has assumed the mortgage debt, in order that an agreement with a subsequent grantee of the mortgaged premises to extend the time of payment should operate to release such intermediate grantee, but it is enough that in extending the time he knew that he was releasing all prior owners who had assumed the mortgage debt, for he is charged in law with knowledge that in the ordinary course there might be, and probably were, such assumptions. *Merrill* v. *Reiners* (1895) 14 Misc. 583, 36 N. Y. Supp. 634.

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But where the assumption of the mortgage debt is not contained in the deed it is necessary that notice of such assumption be brought home to the holder of the mortgage note before he can be charged with having violated the right of the maker of the note as a surety by extending the time of payment. *Pratt* v. *Conway* (1899) 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028.

The view which has met with the most general acceptance—at least in jurisdictions where the mortgagee may hold a grantee who has assumed the mortgage directly liable (see *Union Mut. F. Ins. Co.* v. *Hanford,* hereinafter set forth)—is that an agreement for an extension of time entered into between the mortgagee and a grantee who has assumed the mortgage will, if valid and made upon sufficient consideration, so as to be legally enforceable, discharge the original mortgagor or intermediate grantees who may likewise have assumed the mortgage, unless such extension is assented to by the mortgagor or intermediate grantee, or unless the rights of the mortgagee against such parties are expressly reserved. See *Herd* v. *Tuohy* (1901) 133 Cal. 55, 65 Pac. 139; *Brosseau* v. *Lowy* (1904) 209 Ill. 405, 70 N. E. 901 (affirming 110 Ill. App. 16); *Johnston* v. *Paltzer* (1902) 100 Ill. App. 171 (affirmed on other grounds in 213 Ill. 338, 72 N. E. 702); *Wyatt* v. *Dufrene* (1903) 106 Ill. App. 214; *Union Mut. F. Ins. Co.* v. *Hanford* (1891) 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437 (applying the law of Illinois); *Union Stove & Mach. Works* v. *Caswell* (1892) 48 Kan. 689, 16 L.R.A. 85, 29 Pac. 1072; *Fisher* v. *Spillman* (1911) 85 Kan. 552, 118 Pac. 65; *George* v. *Andrews* (1882) 60 Md. 26, 45 Am. Rep. 706; *Chilton* v. *Brooks* (1890) 72 Md. 554, 20 Atl. 125 (*obiter*); *Franklin Sav. Bank* v. *Cochrane* (1903) 182 Mass. 586, 61 L.R.A. 760, 68 N. E. 200; *Travers* v. *Dorr* (1895) 60 Minn. 173, 62 N. W. 269 (*obiter*); *Nelson* v. *Brown* (1897) 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; *Pratt* v. *Conway* (1899) 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028; *Regan* v. *Williams* (1905) 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; *Steele* v. *Johnson* (1902) 96 Mo. App. 147, 69 S. W. 1065; *Merriam* v. *Miles* (1898) 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861; *Calvo* v. *Davies* (1878) 73 N. Y. 211, 29 Am. Rep. 130 (affirming 8 Hun, 222); *Jester* v. *Sterling* (1881) 25 Hun, 344; *Fish* v. *Hayward* (1882) 28 Hun, 456 (affirmed on opinion of court below in 93 N. Y. 646); *Germania L. Ins. Co.* v. *Casey* (1904) 98 App. Div. 88, 90 N. Y. Supp. 418 (affirmed without opinion in 184 N. Y. 554, 76 N. E. 1095); *Title Guarantee & T. Co.* v. *Weiher* (1900) 30 Misc. 250, 63 N. Y. Supp. 224; *Meuser* v. *Kirschbaum* (1914) 84 Misc. 259, 145 N. Y. Supp. 677; *Dillaway* v. *Peterson* (1898) 11 S. D. 210, 76 N. W. 925; *Miller* v. *Kennedy* (1900) 12 S. D. 478, 81 N. W. 906; *Iowa Loan & T. Co.* v. *Schnose* (1905) 19 S. D. 248, 103 N. W. 22, 9 Ann. Cas. 255; *Bunnell* v. *Carter* (1896) 14 Utah, 100, 46 Pac. 755 (*obiter*);

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Schroeder v. *Kinney* (1897) 15 Utah, 462, 49 Pac. 894; *Fanning* v. *Murphy* (1906) 126 Wis. 538, 4 L.R.A.(N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435; *Mathers* v. *Helliwell* (1863) 10 Grant, Ch. (U. C.) 172.

This rule has been held to apply even where the grantor and grantee were originally jointly liable. See *Merriam* v. *Miles* (1898) 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861.

But in *Union Mut. F. Ins. Co.* v. *Hanford* (1891) 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437, it is said, *obiter*, that by the settled law of the United States Supreme Court a grantee who has assumed payment of a mortgage is not directly liable to the mortgagee at law or in equity, and the only remedy of the mortgagor against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt; and that in that view of the law there may be difficulties in the way of ruling that a person who is under no direct liability to the mortgagee is his principal debtor, and that the only person who is directly liable to him is chargeable as a surety only, and consequently that the mortgagee by giving time to the person not directly and primarily liable to him will discharge the only person who is thus liable.

The reason upon which the rule rests, that the binding extension of time given by a creditor to a principal debtor without the consent of a surety releases the latter, is that a surety on paying the debt has a right of subrogation. But by subrogation he gets only such rights as the creditor actually has; therefore, where the creditor has postponed the debt, the surety, on paying it, cannot sue the principal until the extension expires; but the surety, by the only contract to which he has ever consented, has a right to pay and sue the principal at any day after the debt matures. Hence, the extension deprives him of his right, and from that fact the law conclusively presumes an injury to him and releases him from liability. *Travers* v. *Dorr* (1895) 60 Minn. 173, 62 N. W. 269.

It is immaterial that no injury in fact to the original mortgagor be shown (*George* v. *Andrews* (1882) 60 Md. 26, 45 Am. Rep. 706); since the courts will not inquire whether the mortgagor has been actually damaged by the extension (*Merrill* v. *Reiners* (1895) 14 Misc. 583, 36 N. Y. Supp. 634).

The general acquiescence in the foregoing view, that an extension has the effect absolutely to discharge the original mortgagor, seems to be due to its indorsement by text writers rather than to the satisfactory character of the reasoning on which it is based. As it seems to the writer, its fallacy lies in the assumption that in dealing with the grantee, with knowledge that he has assumed the debt, the mortgagee thereby accepts him as his debtor to the full extent of the debt,

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when as a matter of fact the mortgagee recognizes him only as the owner of the equity in the mortgaged premises. In granting him an extension of time, the mortgagee ordinarily is dealing with him only with reference to the mortgaged property, and without any actual intention of looking to him solely for the payment of the indebtedness secured. And even if it may be said that, after receiving notice of the assumption of the debt, the mortgagee is bound to recognize the suretyship and to respect the rights of the surety in his subsequent dealings with the parties, a fairer rule would be that the mortgagor should be relieved from liability only to the extent to which he may have been prejudiced by the extension, *i. e.*, to the amount of the depreciation in the value of the property during the extension period.

Where the principal of the mortgage debt has become due and payable, the acceptance of interest even one day before it becomes due creates a presumption of an agreement to extend the time for the payment of the mortgage debt for the one day, which will operate to discharge the original mortgagor unless it is shown that such an agreement was not made, or that, if made, the mortgagee expressly reserved the right at any time to return the surplus of interest or apply the same on the principal and enforce payment of the balance. *Germania L. Ins. Co.* v. *Casey* (1904) 98 App. Div. 88, 90 N. Y. Supp. 418, affirmed without opinion in 184 N. Y. 554, 76 N. E. 1095.

— extension by indulgence.

But where the extension is by way of mere indulgence, and not by virtue of a contract upon good consideration susceptible of enforcement, it will not operate to release the mortgagor. *Boardman* v. *Larrabee* (1883) 51 Conn. 39; *Chilton* v. *Brooks* (1890) 72 Md. 554, 20 Atl. 125. And it is immaterial that the property has depreciated in the meantime. The surety has the privilege of hastening the creditor to avoid this loss, and if he fails to use this privilege he comes too late when he asks that the consequences of his neglect shall be visited upon the creditor. *Warner* v. *Williams* (1901) 93 Md. 517, 49 Atl. 559.

An agreement merely to forbear the enforcement of the mortgage, leaving the owner of the mortgaged premises at liberty to pay off the mortgage at any time if he wishes to do so, is without consideration and unenforceable, and therefore does not operate to discharge the original mortgagor. *Title Guarantee & T. Co.* v. *Weiher* (1900) 30 Misc. 250, 63 N. Y. Supp. 224.

— extension as to portion only.

It seems that if the time for payment of a portion only of the mortgage debt is extended, the mortgagor will be relieved only *pro*

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tanto. Metropolitan L. Ins. Co. v. *Stimpson* (1898) 28 App. Div. 544, 51 N. Y. Supp. 226.

Where the mortgage is due and payable in instalments, an extension of time as to one instalment given by the mortgagee to a grantee of the mortgaged premises will not operate to release the mortgagor as to payments not yet matured and not included in the extension, even though the bond and mortgage provide that upon nonpayment of any instalment the whole principal and interest shall, at the option of the mortgagee, become due and payable, such provision being solely for the benefit of the mortgagee, and not entitling the mortgagor to compel the mortgagee to accept full payment before maturity. *Cohn* v. *Spitzer* (1911) 145 App. Div. 104, 129 N. Y. Supp. 104, affirmed on opinion of court below in 207 N. Y. 738, 101 N. E. 1098.

— necessity for, and sufficiency of, consideration for extension.

As above stated, it is an essential condition to the discharge of the original mortgagor from liability that there be a valid agreement for extension supported by a sufficient consideration. See *Metropolitan L. Ins. Co.* v. *Stimpson,* and *Title Guarantee & T. Co.* v. *Weiher, supra,* and, generally, other cases cited throughout this note. Although the question as to what constitutes a sufficient consideration to render the agreement legally binding and enforceable obviously extends beyond the particular group of cases falling within the scope of this note, it may be of interest in the present connection to review the holdings of those cases on this point. The reader is cautioned, however, against deducing any general principles from data thus restricted.

In *Olmstead* v. *Latimer* (1896) 9 App. Div. 163, 41 N. Y. Supp. 44, it was held that an agreement by the owner of the mortgaged premises not to pay the mortgage until the extended time, and then to pay it with interest during the period of extension, constituted a valid consideration for the extension, so that it operated to discharge the original mortgagor.

But in *Fanning* v. *Murphy* (1906) 126 Wis. 538, 4 L.R.A.(N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435, it is held that a mere request for the extension of the due date of the mortgage debt at the contract rate of interest, and a consent thereto, do not satisfy the essentials of a binding contract for an extension so as to discharge the original mortgagor, the court saying: "The point is made that the transaction was, in effect, an exchange of promises, the one being the consideration for the other,—a promise, on the one hand, to keep the money for an additional year at the same rate of interest, as before indicated, and a promise, on the other, to loan the money for such additional year at such rate; *Nelson* v.

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Flagg (1897) 18 Wash. 39, 50 Pac. 571; and *Benson* v. *Phipps* (1895) 87 Tex. 578, 47 Am. St. Rep. 128, 29 S. W. 1061, being referred to in support thereof. There are many such authorities. A pretty full discussion of them is to be found in *Reed* v. *Tierney* (1897) 12 App. D. C. 165. There are still more authorities to the contrary, which, according to substantially the universal judgment of text-book writers, establish the better rule. The reasoning in support of the first theory, as above indicated, is that consent to an obligation for an extension involves an exchange of benefits, which satisfies to the fullest extent all of the essentials of a consideration. The reasoning in support of the other theory is that such a transaction does not add anything to the obligation of the debtor; that, in the absence of it, he would be bound to pay the debt and interest any way as a condition of retaining the money until such time as it should please the creditor to insist upon payment."

In order that such an agreement shall operate to discharge the original mortgagor there must be a reasonably definite time agreed upon, and an agreed equivalent rendered for the extension, and that equivalent must be a real consideration,—something more than the payee would be entitled to in case of a mere indulgence of the payor by allowing the debt to run past due. *Fanning* v. *Murphy, supra.*

The original mortgagor is not discharged upon mere indulgence of the grantee by the mortgagee, or even by a barren promise of the latter to extend time; but where the mortgagee accepts new interest notes for fixed periods on a mutual agreement to extend the loan accordingly, an obligation arises which will release the original mortgagor. *Steele* v. *Johnson* (1902) 96 Mo. App. 149, 69 S. W. 1065.

It has been held that an agreement to pay an increased rate of interest constitutes a valid consideration. *Schroeder* v. *Kinney* (1897) 15 Utah, 462, 49 Pac. 894.

But in *Neukirch* v. *McHugh* (1914) 165 App. Div. 406, 150 N. Y. Supp. 1032, it was held that a promise to pay an increased rate of interest was not a sufficient consideration to support an agreement extending the time for the payment of the mortgage, where the increased rate did not exceed the rate at which the debt would by operation of law bear interest after maturity.

Payment of interest and part of the principal, after all of it has become due, is not such a valid consideration for an extension of time as will discharge the mortgagor. *Regan* v. *Williams* (1905) 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959.

Though the payment by a grantee who has assumed the mortgage, of interest actually due and owing, is an insufficient consideration to uphold an agreement for the extension of time, the payment of such interest by a third person out of his own pocket is a sufficient consideration, so that the agreement will operate to discharge the original mortgagor. *Jester* v. *Sterling* (1881) 25 Hun, 344.

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Payment of interest in advance is sufficient consideration for an agreement to extend the time of payment. *Nelson* v. *Brown* (1897) 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960.

The taking of a life insurance policy is a sufficient consideration for the agreement of the insurance company to extend the mortgage held by it so long as the policy was to run. *Fish* v. *Hayward* (1882) 28 Hun, 456, affirmed on opinion of court below in 93 N. Y. 646.

It has been held that a prior owner of the mortgaged premises is discharged by an extension of time procured by a subsequent grantee, although on account of a default in payment of interest an action is begun to foreclose the mortgage and obtain a deficiency judgment before the period of extension has commenced to run. *Merrill* v. *Reiners* (1895) 14 Misc. 583, 36 N. Y. Supp. 634. The absurdity of the result reached in this case goes, in the opinion of the writer, to show that the criticism above indulged in of the rule therein applied is valid. There is certainly no equity in such a decision. It is, rather, an instance of a technical rule extending beyond its logical basis.

— circumstances under which the grantor continues liable.

Where a mortgage debt is due to two trustees, an extension of time of payment by only one, without the concurrence of the other, being invalid, cannot operate to discharge the mortgagor. *Egbert* v. *McGuire* (1901) 36 Misc. 245, 73 N. Y. Supp. 302.

A receipt acknowledging the payment of interest in full to date and a part of the principal, and containing the words, "and for the ensuing year interest to be 5 per cent," does not evidence any such valid agreement for an extension of time as will discharge a prior owner of the premises from responsibility for the mortgage debt, there being no promise on the part of the debtor so as to bring the case within the rule that mutual promises may constitute a valid consideration for one another. *Merritt* v. *Youmans* (1897) 21 App. Div. 256, 47 N. Y. Supp. 664.

The presumption of an agreement to extend the time of payment arising from the taking of interest in advance is rebutted where it appears that only three days intervened between the payment of the interest and the day when it was due, that the first was a legal half-holiday, the second a full legal holiday, and the third, on which the interest was due, was also a legal holiday. *New York L. Ins. Co.* v. *Casey* (1904) 178 N. Y. 381, 70 N. E. 916, reversing 81 App. Div. 92, 81 N. Y. Supp. 1.

A provision in the agreement for an extension, that nothing therein contained shall in any way affect the right of the mortgagee as against any surety for the mortgage debt, or prevent the mortgagee from taking any proceedings at any time for the purpose of realizing

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upon the mortgage security, either as against any person or the property or estate of any person not a party to the agreement, has the effect to preserve the rights of the mortgagee and the reciprocal rights of the mortgagor, and therefore an agreement for the extension does not operate to release the latter from liability. *Trust & Loan Co.* v. *McKenzie* (1896) 23 Ont. App. Rep. 167.

So, also, in *Calvo* v. *Davies* (1878) 73 N. Y. 211, 29 Am. Rep. 130, it is said that when, in an agreement between a creditor and the principal debtor extending the time of payment, the remedies against the sureties are reserved, the agreement does not operate as an absolute but only as a qualified and conditional suspension of the right of action, and the stipulation in that case is treated in effect as if it was made in express terms subject to the consent of the surety, and the surety is not thereby discharged.

It has been suggested that the consequence of the discharge of the grantor may be avoided by a distinct agreement with the grantee that the suspension of the remedy against the property is not to be operative if the original mortgagor should require the property to be sold for his protection on the grantee's default. See *George* v. *Andrews* (1882) 60 Md. 26, 45 Am. Rep. 706.

An agreement in a bond to which the mortgage is collateral, that "in case of a sale or transfer of any property embraced in a mortgage collateral to this bond; and in case of any agreement or stipulation between the owner or owners of said mortgaged property and the obligees extending the time or modifying the terms of payment above recited, then the above-mentioned obligor shall continue liable to pay the sum above secured according to the tenor of any such agreement unless expressly released and discharged in writing by the above-named obligees,"—is not void for uncertainty, nor unconscionable, but amounts simply to a waiver of a rule of law which the obligors might otherwise invoke for their benefit. *Metropolitan L. Ins. Co.* v. *Stimpson* (1898) 28 App. Div. 544, 51 N. Y. Supp. 226.

— consent of mortgagor or grantor to extension.

The consent of the mortgagor to the extension of time need not be by express agreement; it may be established by evidence of his tacit acquiescence or ratification. *Johnston* v. *Paltzer* (1902) 100 Ill. App. 171, affirmed on other grounds in 213 Ill. 338, 72 N. E. 702.

It has been held that a director of a corporation, who has transferred mortgaged property to it upon its agreement to assume and pay the mortgage, does not, by permitting the treasurer of the corporation to act on its behalf in the management of its fiscal affairs, consent to his negotiating an extension of the time for payment so as not to be discharged by such extension of which he has no knowl-

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edge. *Franklin Sav. Bank* v. *Cochrane* (1903) 182 Mass. 586, 61 L.R.A. 760, 68 N. E. 200.

The minority view.

The view that though, as between themselves, the original mortgagor and his grantee, who assumes the mortgage, may sustain the relation of principal and surety, as to the mortgagee both are principals, severally liable, and therefore that an extension of time to the one will not release the other, is prevalent in Connecticut, Iowa, and Ohio. See *Boardman* v. *Larrabee* (1883) 51 Conn. 39; *Corbett* v. *Waterman* (1860) 11 Iowa, 86; *Iowa Loan & T. Co.* v. *Haller* (1903) 119 Iowa, 645, 93 N. W. 636; *Denison University* v. *Manning* (1901) 65 Ohio St. 138, 61 N. E. 706.

Where this view is entertained, the remedy of the original mortgagor is regarded as being by suit against the grantee, after the maturity of the mortgage debt, to compel him to pay it by virtue of his promise and undertaking as recited in the deed. See *Corbett* v. *Waterman* (1860) 11 Iowa, 86.

The suggestion has also been made that the mortgagor, not being a party to the agreement for an extension and therefore not bound by it, has a right at any time to pay off the debt and proceed against the purchaser on his assumption of its payment. See *Denison University* v. *Manning* (1901) 65 Ohio St. 138, 61 N. E. 706.

In *Corbett* v. *Waterman, supra,* it was said: "While in equity as between the parties to the deed, the vendor is regarded as the surety, and the vendee as the principal debtor, the mortgagee may treat them both as principal debtors as to him and have a personal decree against either or both. And until he has done some act, or it in some manner sufficiently appears that he recognizes the purchaser or vendee as the principal and the original mortgagor as surety merely, both of them will as to such mortgagor be treated as principals. It would not be claimed, of course, and is not in this place, that if both are principals, the extension of time to the vendee, in the absence of fraud or collusion, would have the effect of releasing the mortgagor from his personal liability. But it is claimed, that the extension of time to Hopkins [the grantee] for valuable consideration was in equity treating him as the principal debtor, and Waterman [the mortgagor] as the surety. It may be that this agreement had the effect of recognizing Hopkins as a principal debtor. The agreement, however, did not make him so, for he was this before. Then the material inquiry is, Did it have the effect of making Hopkins the debtor and Waterman the surety as to Corbett [the mortgagee]? He was not, as to Corbett, such surety before, and was not afterwards, unless this agreement had that effect in equity. And we can see no good reason for giving it this effect. The language of the agree-

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ment is quite as consistent with the idea that the mortgagee still regarded the mortgagor liable as a principal, as that he designed placing him in the position of or recognizing him as a surety, and there is nothing in it from which the mortgagor could be led to infer that he was to be so treated, or that he was likely to be misled thereby."

In *Connecticut Mut. L. Ins. Co.* v. *Mayer* (1879) 8 Mo. App. 18, where the question was whether the mortgagor was released by the act of the mortgagee in permitting a grantee who had assumed the mortgage to remove machinery and fixtures from the mortgaged premises, the court made use of the following language: "Upon principle, it would seem that a clear distinction may be taken between a suretyship which is created with the express consent of the creditor,—as in an original contract,—and a suretyship which arises by operation of law in a later transaction, to which the creditor is not a party. In the former case the creditor is, by his own act, bound to recognize all the distinctive rights of the surety, whose obligation to him exists in no other capacity, from the beginning. He must, therefore, do nothing which may lessen the surety's recourse, or chances for indemnification, in the event of his having to pay the debt. But in the latter case he has voluntarily assumed no such duty. It becomes a question, then, whether the law can cast it upon him without his consent, and thus, in effect, alter the terms of his original contract. Counsel for the defendant seems to think it unreasonable to suppose a suretyship as between the principal debtor and the surety, which is yet not a suretyship as to the creditor. There is no difficulty about this. Between the principal and surety, questions of reimbursement or indemnity may arise, with which the creditor has nothing to do. These must, of course, be determined by the relations existing between the parties interested, either of whom may yet stand in a different relation with the creditor. As to him, both may be principal debtors, or otherwise." And after reviewing a number of cases bearing upon the question, the court continued: "These views appear to be clearly consonant with the principle that the contract rights of the mortgagee cannot be changed by acts of the mortgagor and his grantee to which the creditor is not a party. He may therefore continue to hold the mortgagor as a principal debtor; and while he so holds him, there can be no discharge of liability on the ground of indulgence to one who, for certain purposes not affecting the creditor, stands toward the original debtor in the relation of a principal to his surety."

In Ohio, it has been held that where a mortgagor sells the mortgaged premises to a third person, who as part of the price assumes and agrees with the mortgagor to pay the mortgage debt, of which assumption the mortgagee has notice, an agreement with the purchaser by the mortgagee to extend the payment of the mortgage debt without the consent of the mortgagor does not wholly discharge the

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mortgagor from personal liability, but only to the extent to which loss has resulted from such extension, the case being regarded as falling within the rule that where the original obligation of the surety remains unchanged, and only his equitable rights or remedies have been invaded by the wrongful act or omission of the creditor, he will be relieved only to the extent of his actual injury. *Teeters* v. *Lamborn* (1885) 43 Ohio St. 144, 1 N. E. 513.

The decision in *Teeters* v. *Lamborn, supra,* so far as it holds that had the answer alleged, and the proof shown, that the mortgagors incurred loss or damage by reason of the extension, they would have been discharged *pro tanto,* is, however, disapproved and characterized as *obiter* in *Denison University* v. *Manning, supra,* where the court said: "The first proposition is that the sale and conveyance of the mortgaged land by the Mannings to Babbitt, his assumption as a part of the purchase price to pay the note of the Mannings to the University, and the knowledge by the University of that arrangement and its consent thereto, and accepting the payment of interest from the purchasers, changed the relation of the Mannings to the note from that of principal makers to that of sureties only. In other words, if a principal maker of a note, and mortgage given to secure its payment, can effect the sale of the mortgaged lands, and obtain an agreement by the purchaser to pay the mortgage debt, and the mortgagee, being apprised of the transaction, consents to it, and allows the purchaser to make payments on the note, he thereby releases the original maker as principal and may treat him thenceforth as a surety only. The proposition is not that the mortgagee agreed to release the original debtor, or to accept the purchaser as such original debtor; no such averment appears; it is plainly and baldly that the effect in law of the consent of the mortgagee that the purchaser may pay, and allowing him to do so, *ipso facto* works a change in the relation of the principal maker to the note. Expressions here and there in text-books seem to countenance this conclusion, and there are decisions of courts to like effect. But is it sound? That, as between the mortgagor and the purchaser, the general relation of surety and principal may be created by reason of their contract, can be conceded, but this falls very far short of changing the relation of a mortgagor from a principal to a surety as respects the mortgagee. The mortgagor has received the full consideration, and has executed his solemn promise in writing to pay the obligation unconditionally. The sale of the mortgaged property is made between the parties to it solely for their advantage, and in no sense for the benefit of the mortgagee. He need not know, and ordinarily does not know, anything about the transaction until after it is completed. If he happens to know that the negotiation is in progress, it is not within his power to arrest it, nor has he any voice in shaping it. He is as absolutely helpless to prevent it as is a total stranger. Inci-

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dentally it may work to his advantage. That is, being an agreement with the original payor to pay the debt, the creditor may, if he so elect, take advantage of it. *Emmitt* v. *Brophy* (1884) 42 Ohio St. 82. But the agreement is not made for his benefit; as before stated, it is wholly for the benefit of the parties to it. Nor could they compel the mortgagee to recognize the sale or look to the purchaser for the payment of the debt. . . . This being the situation, why should the mortgagor be accorded the right to compel the mortgagee to elect between the repudiation of the obligation thus assumed by the purchaser and a novation by which he releases the original debtor from his obligation as principal, and consents that from thenceforth he shall be regarded as surety only? Why should the creditor be compelled to trade debtors or release any security he already holds? Whether the obligation is paid by the maker, or by one to whom he has transferred the property forming the security, is a matter of indifference to the payee; for that purpose one hand is as good as another. We are of opinion that the proposition is not sound; that the facts stated do not show that the Mannings became sureties as between them and the University. Hence, the further proposition that the Mannings are released because of the alleged agreement to extend the time for payment of the principal, by reason of a promise to pay 7 per cent interest, without their consent, is without support in law. It is urged that the allegation of an agreement to extend the time of payment of itself implies in law a previous agreement to accept the purchasers as principal debtors. We are of opinion that it does not. The mortgagee, being under no obligation to accept the purchasers as principal debtors, or as debtors of any kind, had a legal right to exonerate them from direct obligation to it altogether, and *a fortiori* could assent to relieve them for a time. It is further urged that the Mannings were damaged by this agreement. How? The simple delay was not a matter of which they could find fault. (*Dye* v. *Dye* (1871) 21 Ohio St. 86, 8 Am. Rep. 40; *Moore* v. *Gray* (1875) 26 Ohio St. 525.) And we have already found that they could not compel the creditor to sue the purchasers; nor could they complain of an agreement between purchaser and mortgagee unless they were thereby deprived of some existing right, though, as between them and the purchasers, they were sureties. Using the language of the court in *Jenkins* v. *Clarkson* (1835) 7 Ohio, pt. 1, p. 76: 'If the surety has been deprived of no right; if he has been left perfectly free to manage his concerns with his principal in his own way; if his hands have not been tied, why should he complain?' They would not be deprived of their right at any time to pay off the debt and proceed against the purchaser on his assumption of its payment. Not being parties to the agreement for an extension, they were not bound by it, and all the remedies that they possessed before the extension remained to them after."

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The case of *Shepherd* v. *May* (1885) 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep. 119, sometimes (as in *Keller* v. *Ashford* (1889) 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494) cited as holding that an agreement on the part of a grantee to pay the mortgage does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter by giving time to the grantee will discharge the mortgagor,—cannot be regarded as effectively supporting that proposition, since what was said on the question is purely *obiter*. In that case it was held that the purchaser of the mortgaged premises did not, either by purchasing subject to the mortgage, without agreeing to assume it, or by expressly promising the mortgagee to pay the debt, become personally liable therefor, so as to become a principal debtor and to convert the original mortgagor into a surety, with the consequence that an agreement for the extension of the mortgage, entered into without the consent of the original mortgagor, would operate to relieve him from personal liability.

II. Where the grantee has not assumed the mortgage.

In *Trust & Loan Co.* v. *McKenzie* (1896) 23 Ont. App. Rep. 167, it was held that an agreement to extend the time for payment of a mortgage, made with a remote grantee whose grantors have not assumed the mortgage debt, has the effect, in the absence of a stipulation that if the mortgagor pays or is compelled to pay the debt before the time agreed upon the agreement for the extension shall not stand in the way of his indemnity, to discharge the original mortgagor, the court saying: "By agreement between the mortgagees and the owner, the land has been tied up for two years, and the mortgagor's right to resort to the land for indemnity has been destroyed. His right was a right to immediate indemnity, and that right is now gone by the act of the mortgagee. The mortgagee has, therefore, by his agreement with the present owner, made his mortgage unredeemable by the mortgagor according to the terms, and the effect of that must be to discharge the mortgagor from liability altogether. The mortgagor's liability on his covenant and his right to have the mortgage estate restored to him upon payment are reciprocal, and if the mortgagee cannot restore the estate in its integrity save so far as any impairment was warranted by the terms of the mortgage itself, such as a sale of part of the land under a power, etc., then he cannot enforce the debtor's covenant, his liability is gone."

A case which goes to the other extreme is *Chilton* v. *Brooks* (1890) 72 Md. 554, 20 Atl. 125, in which it was held that where no personal obligation on the grantee to pay the mortgage debt is created, the relation of principal and surety as between the grantor and grantee does not arise, and the grantor is not discharged, nor his liability

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on the mortgage debt affected, by any indulgence as to the time of payment given by the mortgagee or his assigns to the grantee in the deed.

And in *Shepherd* v. *May* (1885) 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep. 119, the original mortgagor was held personally liable for a deficiency remaining after foreclosure and sale of the mortgaged premises, notwithstanding an extension of time given a grantee who had not assumed the mortgage; but it does not appear that there was a depreciation in the value of the premises during the period of extension, and the mortgagor failed to show that the extension was given without his assent. The case is, therefore, of no general value in relation to the topic under discussion.

The true view as to the effect of an extension given a grantee not personally liable for the mortgage debt seems to be that expressed in the cases which follow.

Where the mortgagor conveys the equity of redemption subject to the mortgage, for which the grantee does not contract to become personally liable, the relation of the mortgagor to his grantee becomes that of surety only in the sense that he is entitled to have the security regarded as the primary fund for the payment of the debt. Accordingly, where the mortgagee agrees with the grantee to extend the time for the payment of the mortgage debt, such agreement, affecting the right of foreclosure by extending the time for such payment, will operate to release the mortgagor only to the amount to which by reason of such extension the security falls short of the amount due. *North End Sav. Bank* v. *Snow* (1908) 197 Mass. 339, 125 Am. St. Rep. 368, 83 N. E. 1099.

So, also, in *Travers* v. *Dorr* (1895) 60 Minn. 173, 62 N. W. 269; and *Sime* v. *Lewis* (1910) 112 Minn. 403, 128 N. W. 468, it is held that where the mortgagor conveys the mortgaged premises subject to the mortgage the land becomes, as between the mortgagor and his grantee, the primary fund for the payment of the mortgage, creating the relation of principal and surety between the land and the mortgagor; and that hence if the mortgagee, with knowledge of the conveyance, gives a binding extension of time to the grantee without the consent of the mortgagor, the latter is released to the extent of the value of the land.

Where the grantee of the mortgaged property does not assume the mortgage, but merely takes subject thereto, the grantor occupies, to the extent of the value of the land, the position of, and is entitled to the same rights as, a surety; and so where the holder of the mortgage has, by a valid contract with the owner of the equity of redemption, postponed the time for its payment beyond the time therein provided, the effect of such agreement is not altogether to discharge the grantor from liability, as in the case where the grantee has assumed a personal liability, but to the extent of the value of the mortgaged

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property at the time of the extension. *Murray* v. *Marshall* (1884) 94 N. Y. 611 (overruling *Penfield* v. *Goodrich* (1877) 10 Hun, 41); *Spencer* v. *Spencer* (1884) 95 N. Y. 353; *Re Piza* (1896) 5 App. Div. 181, 38 N. Y. Supp. 540; *Winslow* v. *Stoothoff* (1905) 104 App. Div. 28, 93 N. Y. Supp. 335; *Wiener* v. *Boehm* (1908) 126 App. Div. 703, 111 N. Y. Supp. 126; *Cohen* v. *Hecht* (1908) 128 App. Div. 511, 112 N. Y. Supp. 809; *Cohn* v. *Spitzer* (1911) 145 App. Div. 104, 129 N. Y. Supp. 104, affirmed on opinion of court below in 207 N. Y. 738, 101 N. E. 1098; *Meuser* v. *Kirschbaum* (1914) 84 Misc. 259, 145 N. Y. Supp. 677; *Metzger* v. *Nova Realty Co.* (1915) 214 N. Y. 26, 107 N. E. 1027; *Walter* v. *Nova Realty Co.* (1915) 214 N. Y. 610, 107 N. E. 1029; *Neukirch* v. *McHugh* (1914) 165 App. Div. 406, 150 N. Y. Supp. 1032; *Bunnell* v. *Carter* (1896) 14 Utah, 100, 46 Pac. 755.

In discussing the question whether the extension of a bond and mortgage under such circumstances operates to discharge the grantor of the mortgaged premises from liability, and, if so, to what extent, Finch, J., delivering the opinion of the court in *Murray* v. *Marshall* (1884) 94 N. Y. 611, said: "While, as we have said, no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to the mortgage, an equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of a surety, the terms of whose contract have been modified. We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond, it is not inaccurate to say that as grantee, and in respect to the land, and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor has the equities of a surety. This follows inevitably from the right of subrogation which inheres in the original contract of sale and conveyance. It is a definite and recognized right which, in the absence of an express agreement, will be founded upon one implied. (*Gans* v. *Thieme* (1883) 93 N. Y. 232.) When the mortgagor in this case sold expressly subject to the mortgage, remaining liable upon his bond, he had a right as against his grantee to require that the land should first be exhausted in the payment of the debt. Presumably the amount of the mortgage was deducted from the purchase price, or at least the transfer was made and accepted in view of the mortgage lien. Seller and buyer both acted upon the understanding that the land bound for the debt should pay the debt as far as it would go, and their contract necessarily implied that agreement. Through the right of subrogation the vendor could secure his safety, and that right could not be invaded with impunity. It was

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invaded. When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated, and never consented to. The value of the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation. What he did was a conscious violation of this right, for the fact that he dealt with the grantee for an extension of the mortgage shows that he knew of the conveyance, and that it left the land bound in the hands of the grantee. Knowing this, he is chargeable with knowledge of the mortgagor's equitable rights, and meddled with them at his peril. But it does not follow that the vendor was thereby wholly discharged. The grantee stood in the quasi relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in any manner disturbed. The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value. At the moment of the extension his right of subrogation was taken away, and at that moment he was discharged to the extent of the value of the land, since the extension barred his recourse to it, and once discharged he could not again be made liable. From that moment the risk of future depreciation fell upon the creditor, who by the extension practically took the land as his sole security to the extent of its then value, and assumed the risk of getting that value out of it in the future. But the special term went further, and held that the mortgagor was absolutely discharged by the extension. That might or might not be, and depended upon the question whether the value of the land equaled or fell below the debt. For conceding the general rule that the surety is discharged utterly by a valid extension of the time of payment, and that the mortgagor stands in the position and has the rights of a surety, it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land; and beyond that is still principal debtor without any remaining equities."

So, where the mortgaged premises have been conveyed subject to the mortgage, which, however, is not assumed by the grantee, a fail-

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ure of the mortgagee to proceed to collect the mortgage when due, though requested to do so, will release the original mortgagor from liability to the extent of the then value of the property. *Osborne* v. *Heyward* (1899) 40 App. Div. 78, 57 N. Y. Supp. 542.

In *Metzger* v. *Nova Realty Co.* (1915) 214 N. Y. 26, 107 N. E. 1027 (affirming 160 App. Div. 394, 145 N. Y. Supp. 549), and *Walter* v. *Nova Realty Co.* (1915) 214 N. Y. 610, 107 N. E. 1029, it was held that the following clause in the agreement for extension, that "nothing herein contained shall impair the security now held for said debt, or any condition or agreement contained in said bond and mortgage, which bond and mortgage the party of the second part hereby ratifies and confirms as modified by this agreement," was not sufficient to take the case out of the rule laid down in the foregoing decisions.

It has been held that an extension of time granted to one to whom the mortgaged premises had been conveyed by the heirs of the original mortgagor will operate to release such heirs from their liability as heirs of the mortgaged property, and as heirs of other real estate from the deceased mortgagor, liable in case of deficiency of personal assets for the latter's debts. *Olmstead* v. *Latimer* (1896) 9 App. Div. 163, 41 N. Y. Supp. 44.

Extension of time to original debtor as discharging grantee of mortgaged premises.

In conclusion, reference may be made to some cases involving the converse situation,—*Blanchard* v. *Naquin* (1906) 116 La. 806, 41 So. 99, where it was held that the owner of notes secured by a mortgage containing a *pact de non alienando* does not lose his mortgage by consenting with the maker of the notes and mortgagor, without consulting a third person to whom the mortgagor's property may have been sold, to an extension of the time for the payment of the notes; and *Montague County* v. *Meadows* (1899) 21 Tex. Civ. App. 256, 51 S. W. 556, where it is held that inasmuch as the land when originally mortgaged was not a mere surety for the payment of the debt, but a primary security, an extension of time on the note secured by the mortgage, without the consent of a subsequent grantee of the mortgaged premises, cannot have the effect of releasing them from the lien.

Extension as releasing guarantor of mortgage.

An assignor of the mortgage who has guaranteed its payment is wholly released from liability on such guaranty by the extension of time given to a grantee of the mortgaged premises, even though the person to whom such extension is granted is not personally liable for

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the mortgage debt. *Antisdel* v. *Williamson* (1901) 165 N. Y. 372, 59 N. E. 207; *Bristol & W. of E. Land Co.* v. *Taylor* (1893) 24 Ont. Rep. 286. E. S. O.

[ENGLISH DIVISIONAL COURT.]

HERDMAN *v.* WHEELER.

[1902] 1 K. B. 361.
Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

Promissory note — Inchoate instrument — Negotiation — Bills of exchange act 1882 (45 & 46 Vict. chap. 61), § 20.

The defendant, having agreed to borrow the sum of 15*l.* from A, signed and handed to A a blank stamped paper which he authorized A to fill up as a promissory note payable to A and for the sum of 15*l.* only. The stamp upon the paper, however, was sufficient to cover a sum of 30*l.* A, in breach of his authority, fraudulently filled up the paper as a promissory note for 30*l.* and payable to the plaintiff; and he handed it to the plaintiff, who gave value for it without notice of A's breach of authority. A misappropriated the proceeds. In an action by the plaintiff on the promissory note:—

Held, that the delivery of the note by A to the plaintiff was not a negotiation of the note within the meaning of the proviso to § 20, subsec. 2, of the bills of exchange act 1882, so as to entitle the plaintiff to recover.

Quære, whether the payee of a note can, under any circumstances, be a holder of it in due course.

(December 16, 1901.)

APPEAL by the plaintiff from a judgment of the judge of the Newcastle County Court in favor of the defendant. The action was by the payee against the maker of a promissory note for 30*l.* The defendant applied to one Anderson to lend him a sum of 15*l.*, which Anderson promised to do. The defendant, at Anderson's request, signed his name upon a blank stamped paper and handed it to Anderson, with authority to fill it up as a promissory note for 15*l.* payable to Anderson only. The paper in question was stamped with a ninepenny stamp, which was sufficient to cover a note for 75*l.* Anderson, having the defendant's

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signature to the note in blank, asked the plaintiff through the telephone if he would lend the [**362**] defendant 25*l.* upon the defendant's promissory note for 30*l.* at a month. The plaintiff agreed to do so, and wrote a cheque for 25*l.*, payable to the order of the defendant, and left it with his wife to be exchanged for the promissory note. Anderson then sent the promissory note filled up for 30*l.*, with the plaintiff's name inserted as payee, by a clerk, and received the cheque. The plaintiff's cheque for 25*l.* was presented at the bank on which it was drawn with an indorsement purporting to be the defendant's, but which was not his. In the result the defendant received no part of the proceeds of the promissory note.

Arthur Powell, for the plaintiff. The question is which of two innocent parties is under the circumstances of the case to bear the loss; and the answer to it depends upon the construction to be placed on § 20 of the bills of exchange act 1882.[1]

It is said on the part of the defendant that the proviso in the section as to negotiation does not apply as between the immediate parties to a promissory note. But that contention cannot be supported. All that the proviso requires is that the note shall, "after completion," be "negotiated to a holder in due course." Now § 31 shows that all that is meant by "negotiated" is that the note shall be "transferred from one person to another in such a manner as to constitute the transferee [**363**] the holder." Here the note was transferred to the plaintiff in such a manner

[1] By the bills of exchange act, 1882, § 20, "(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.

"(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

"Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given."

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as to constitute him the holder, for by § 2 "holder" includes "the payee of a note who is in possession of it," and the plaintiff was payee in possession. Secondly, he was a "holder in due course," for he satisfied the conditions of § 29,[1] the note being complete and regular on the face of it, and he having taken it without notice of any defect in the title of his transferrer. Thirdly, the note was negotiated to him "after completion," for the instrument was completed when it was filed up with the amount and the name of the payee. Therefore the case falls exactly within the language of the proviso. It cannot be disputed that, if Anderson had put his own name in the note as payee and then indorsed it to the plaintiff, there could be no defense to the action, and yet the result to the parties would have been exactly the same. The defendant, by enabling Anderson to commit the fraud, ought to be the party to bear the loss. The proposition of Ashhurst, J., in *Lickbarrow* v. *Mason* (1787) 2 T. R. 63, 1 Revised Rep. 425, 4 Eng. Rul. Cas. 756, that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," has recently been treated in the Court of Appeal as a sound expression of the law. *Farquharson Brothers* v. *King* [1901] 2 K. B. 697, at p. 708, 70 L. J. K. B. N. S. 985, 49 Week. Rep. 673, 85 L. T. N. S. 264, 17 Times L. R. 689.

Bruce Williamson, for the defendant. There is no authority for the proposition that the proviso to § 20 applies as between the immediate parties to a promissory note. The issue of a bill or note to the first holder stands on a different footing from the transfer of it from one holder to another. There was no negotiation of the note within the meaning of the proviso. Apart from the act, the term "negotiation" means the [364] transfer of rights under the contract contained in the instrument by one person to another. But the maker of a note has no rights to

[1] By § 29, subsec. 1, "a holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

"(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

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transfer. As between the immediate parties to it, a note is a mere simple contract. It has none of the incidents of negotiability until it has been transferred. Till then it does not require protection as part of the mercantile currency of the country. And the term is used in precisely the same sense in the act. Section 31 shows that a bill is negotiated when it is "transferred from one person to another" in a certain manner. The negotiation of an instrument is distinguished from the delivery of it to the immediate payee, the technical term for which is "issue." See § 2. The proviso to § 20, moreover, requires that the negotiation should be after completion. But by § 84 "a promissory note is inchoate and incomplete until delivery thereof to the payee." And it must be assumed that the word "complete" is used in the same sense in the two sections. Therefore, the negotiation here would have to be after delivery to the plaintiff. But that was not the case. The *dictum* of Ashhurst, J., in *Lickbarrow* v. *Mason* (1787) 2 T. R. 63, 1 Revised Rep. 425, 4 Eng. Rul. Cas. 756, is too wide. It is negatived by the judgments of the Lords in *Scholfield* v. *Lord Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124.

Powell, in reply. "Completion" in § 20 means completion as regards the document only, and does not import all the requirements of § 84.

Cur. adv. vult.

The judgment of the court (Lord Alverstone, Ch. J., Darling and Channell, JJ.) was read by

Channell, J. This was an appeal from a judgment of the judge of the Newcastle County Court given for the defendant in an action by the payee against the maker of a promissory note for 30*l.*, and the principal point involved is the construction of the 20th section of the bills of exchange act. The facts are not in dispute. The conduct of each of the parties to the action appears to have been quite straightforward and honest, and the evidence of each of them has been accepted as true. The difficulties which arose were occasioned by the [**365**] fraud of one Anderson, who is now dead. The facts are as follows. Mr.

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Wheeler, the defendant, was a curate at Sunderland, and, being about to remove to Norfolk, he required a temporary loan of 15*l.* to pay the expenses of removing. He applied to Anderson to lend him the money, and Anderson promised to do so. The defendant, however, seems to have understood that Anderson proposed to get the money from someone else, and the name of the plaintiff Herdman was mentioned as a person who would lend it; but the defendant objected to borrowing the money himself direct from the plaintiff. The defendant gave to Anderson a promissory note payable to Anderson for 15*l.*, and expected to get the money from Anderson the next day. We think he must have expected that Anderson would have borrowed the money, and probably from the plaintiff. If he knew anything of business he must have understood that his promissory note would be indorsed by Anderson to the lender of the money. On the next day Anderson saw him and did not give him the money, but informed him that the promissory note was in some way wrongly made out, and gave it back to him, and it was burned. In lieu of it the defendant gave to Anderson his signature on paper stamped with a ninepenny stamp, which would be sufficient for a note for 75*l.* This was done at a restaurant when the defendant was in a hurry, and he trusted Anderson to fill it up, but only authorized him to do so as a promissory note payable to himself and for 15*l.* only. Anderson promised to send the 15*l.* He did subsequently send a cheque of his own for 15*l.*, which, however, was dishonored. Anderson having got the defendant's signature to the note in blank, communicated with the plaintiff through the telephone, and asked him if he was willing to lend the defendant 25*l.* upon his promissory note for 30*l.* at a month. He represented that the defendant was in urgent need of the money and was willing to pay the 5*l.* for the accommodation; but he further stipulated that if the money was repaid in a week 2*l.* only should be charged instead of 5*l.* The plaintiff agreed to the proposal, and it was arranged that Anderson should bring or send the promissory note and receive the money. The plaintiff, having to go out, [**366**] wrote a cheque for the 25*l.* payable to the order of the defendant, and left it with his wife to be exchanged for the promissory note. Anderson then sent him the promissory note by a clerk, and received the cheque from the

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plaintiff's wife. The promissory note when received by the plaintiff's wife was filled up as a promissory note for 30*l.* with the plaintiff's name inserted as payee. It was on the face of it complete and regular in all respects, and the plaintiff had no notice that it had been signed in blank, or that Anderson had in any way acted without authority. The plaintiff's cheque for 25*l.* was presented at the bank on which it was drawn with an indorsement purporting to be the defendant's, but which was not his, and the indorsement appears to have been forged by Anderson. The defendant appears to have got cash from someone for Anderson's cheque for 15*l.*, but when it was dishonored he had to take it up. In the result, therefore, he got no part of the proceeds of the promissory note. When the week elapsed the plaintiff wrote to the defendant on the matter; and then some correspondence took place in which the plaintiff and the defendant each stated the facts so far as they knew them. The defendant upon receiving the plaintiff's letter had some communication with Anderson, who promised to settle the matter, and gave him a receipt purporting to be a discharge of his liability; but Anderson did not settle with the plaintiff, and died within a few days and before the promissory note became due. This action was brought in the High Court, and, the defendant having got leave to defend, it was transferred to the Newcastle County Court. The judge on these facts gave judgment for the defendant.

The liability of the defendant appears to depend upon whether the case comes within the proviso at the end of the 20th section of the bills of exchange act,—that is, whether in this case the note was within the meaning of the words as used in that section, "after completion negotiated to a holder in due course." On the part of the defendant it was not denied on the argument before us that the plaintiff was a holder in due course, but it was said that the note was not negotiated to him, and that if it was it was not negotiated after completion. Since [**367**] the argument we have been referred by counsel for the defendant to the case of *Lewis* v. *Clay* (1897) 67 L. J. Q. B. N. S. 224, 77 L. T. N. S. 653, 46 Week. Rep. 319, 14 Times L. R. 319, as an authority that the plaintiff was not in this case a holder in due course. On the argument it was further said that § 84 shows that

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the note was incomplete until the delivery to the plaintiff, and consequently, if it could be said to be "negotiated" to him at all, it was not "after completion," but either before or at most simultaneously with completion; but it was further said—and this we think is the substantial argument for the defendant—that it was never negotiated to the plaintiff, as he was the payee and an original party to the contract contained in the note, and did not become a party by transfer. It was contended that a bill or note is only negotiated when it is transferred from one holder to another, and for this § 31 is referred to. In substance the argument for the defendant and the judgment of the county court judge in his favor comes to this,—that the proviso in § 20 can have no application as between the immediate parties to a note or bill. If this is the necessary meaning of the words used in the proviso, we must of course give effect to it and affirm the judgment for the defendant, for the bills of exchange act is now the code of law on the subject, and in cases where it differs from the old law it prevails over the old law. But if the words used in the act are fairly capable of being construed as meaning the same as the words used by judges previously to the act in stating the law, it would be right to give them that meaning in the absence of anything to indicate a clear intention of the legislature to alter the previous law. Further, by § 97, subsec. 2, the rules of the law merchant are to continue to apply to bills and notes except so far as they are inconsistent with the express provisions of the act. It is therefore material to see what light the law on this subject before the act throws on the case before us.

We find Bowen, J., stating the law thus in *Garrard* v. *Lewis* (1882) 10 Q. B. D. 30, at p. 35: "I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is [**368**] intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered." Of course such a case as the present, where there was no marginal figure, but only verbal instructions to fill in 15*l.* as the amount, is an *a fortiori* case. It will be ob-

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served that the words, "when the bill reaches the hands of a holder," are wide enough to cover the case of the payee, unless it could be contended that a payee was not a holder. Again, Lord Selborne in *France* v. *Clark* (1884) 26 Ch. D. 257, at p. 262 expresses the rule thus: "The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a bona fide holder for value without notice; but it has been repeatedly explained that this estoppel is in favor only of such a bona fide holder." This statement would appear to include the case where the name of the person who became bona fide holder had been inserted as payee. The reported cases in which a holder, who had given value for a bill after it had become complete and regular on the face of it, has been held entitled to recover, notwithstanding that the bill had in fact been signed by the defendant in blank and had been filled up otherwise than in accordance with the defendant's authority, will, we believe, be found to be all cases where the holder was indorsee and not payee, but it is obvious that cases such as the present, where the payee's name was inserted without his knowing of the bill having been in blank, would be rare. The language of the judges seems wide enough to cover the case of payee as well as the case actually before them, but that is all that can be said. There are, of course, cases where the payee's name has been [**369**] inserted by himself, and where he has been entitled to recover, as *Crutchly* v. *Mann* (1814) 5 Taunt. 529, 1 Marsh. 29; *Harvey* v. *Cane* (1876) 34 L. T. N. S. 64, 24 Week. Rep. 400, and *Scard* v. *Jackson* (1875) 34 L. T. N. S. 65, note; but in these it seems that there had been nothing done in excess of the defendant's authority except the mere putting of the payee's name. In *Harvey* v. *Cane, supra,* it was said that "anybody who gets the bill (*i. e.,* one with the drawer's name omitted) fairly is prima facie entitled to insert his own name as drawer;" and, if this wide statement is correct, it would seem that a payee stands in as good a position as an indorsee when he bona fide gives value for the bill; but in *Harvey* v. *Cane* the court also seems to

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have come to the conclusion that what was done came substantially within the defendant's authority.

As to the cases relied on by the defendant, on the argument before us: in *Awde* v. *Dixon* (1851) 6 Exch. 869, 20 L. J. Exch. N. S. 295 the form of the bill showed that it had been prepared for signature by more than one person, so that the plaintiff had notice of the defect. *Scholfield* v. *Lord Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124, differs from this, that there the bill was a perfect bill when the defendant signed it, and what was said as to forgery does not appear to apply to the case of a bill or note in blank when it was signed. See *London and South Western Bank* v. *Wentworth* (1880) 5 Ex. D. 96, 49 L. J. Exch. N. S. 657, 42 L. T. N. S. 188, 28 Week. Rep. 516, which case does not appear to have been dissented from in the House of Lords in *Scholfield's Case, supra.*

The cases quoted by the defendant on the argument do not appear, therefore, to help him very much; but, on the other hand, the investigation of the law before the bills of exchange act appears to show that there is no case which would be a distinct authority in favor of the plaintiff if the law were still as before the bills of exchange act. The law has been stated by various judges in general terms in such a way as to cover the case, but they do not appear to have had their attention specially drawn to the point.

We therefore approach the consideration of the words used in the act without any very clear guide from the previous [370] state of the law; but we do rather expect to find the bona fide holder for value without notice, or the holder in due course as he is now called, fully protected. Passing now to the words of the 20th section of the act, the 1st subsection of that section shows that Anderson had a prima facie authority to fill up this note; but that in this case is hardly important. The 2d subsection shows that, unless the case comes within the proviso at the end, the note is not enforceable against the defendant because it was not filled up strictly in accordance with the authority given. It was suggested on the argument that this first part of the 2d subsection would never be wanted if the proviso had the effect contended for by the plaintiff; but on consideration there seem

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to be cases which would arise fairly often in practice which would not be within the proviso, and where the first part of the 2d subsection would take effect. The proviso can never operate in favor of a person who knows the acceptance of the bill to have been in blank. If in the present case Anderson, instead of communicating through the telephone with the plaintiff, had brought the stamped paper signed by the defendant with him and had filled it up in the plaintiff's presence, the plaintiff would certainly have been put on inquiry as to Anderson's authority, and, by reason of the first part of the 2d subsection, could only have recovered if Anderson was acting strictly within his authority. So, in all cases where the plaintiff has been allowed to recover on a bill in which he had inserted his own name as payee, he would, we think, now have to show that this was within the authority given by the defendant. This is in accordance with the cases before the act, with the possible, though not clear, exception of *Harvey* v. *Cane* (1876) 34 L. T. N. S. 64, 24 Week. Rep. 400. See *Hogarth* v. *Latham* (1878) 3 Q. B. D. 643, 47 L. J. Q. B. N. S. 339, 39 L. T. N. S. 75, 26 Week. Rep. 300, and the remarks on *Harvey* v. *Cane* in that case 3 Q. B. D. at pp. 646, 647; see also per Lord Selborne in *France* v. *Clark* (1884) 26 Ch. D. 257, at p. 262, 53 L. J. Ch. N. S. 585, 50 L. T. N. S. 1, 32 Week. Rep. 466. Then comes the important proviso, "Provided that if any such instrument" (that is, an instrument which has been either a simple signature on stamped paper, or a bill wanting in any material particular) "after completion is negotiated," etc. [**371**] Now, it seems to us that completion here refers to completing the form of the bill, or supplying the wanting "material particular." It is, after it has been made complete and regular on the face of it, to take the words of § 29, defining holder in due course.

We do not think the word "completion" as used in this proviso includes delivery. It is the form of the instrument which is being referred to, and not its ceasing to be inchoate and revocable and becoming an operative instrument, which is the matter referred to in the 84th section. But even if the bill could not be said to be completed unless delivered to someone, here it was delivered to the plaintiff, and, if what happened on his giving his cheque for it and becoming the holder for value is "negotiating it

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to a holder in due course," it may, we think, be said to be "negotiated after completion."

The real question is, Does "negotiated to a holder in due course" cover what was done in this case? The plaintiff undoubtedly became the holder of the bill for value when it was handed to his wife, and she gave over his cheque in exchange. It is true that the cheque was paid on a forged indorsement, but the 60th section of the bills of exchange act authorizes the plaintiff's bankers to charge him with the money so paid; so that his money is gone, and the case, we think, is the same as if he had paid 25*l.* in cash for the promissory note. This brings us to the important words, "negotiated to a holder in due course;" and it is necessary to consider the case of *Lewis* v. *Clay* (1897) 67 L. J. Q. B. N. S. 224, at p. 227, to which our attention has been called since the argument. In that case the late Lord Chief Justice said, in an action brought by the payee of promissory notes: "Further, an examination of §§ 20, 21, 29, 30, and 38, relating expressly to bills, and §§ 83, 84, 88, and 89, relating to promissory notes, will make it clear that 'a holder in due course' is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning [**372**] of the act. I desire to say here that, even if the plaintiff were 'holder in due course,' it would, in my judgment, make no difference in the result." The Chief Justice there gave his judgment really on the same ground as that on which *Foster* v. *Mackinnon* (1869) L. R. 4 C. P. 704, 38 L. J. C. P. N. S. 310, 20 L. T. N. S. 887, 17 Week. Rep. 1105 was decided, and at the end of his judgment he again refers to this question, and says that it follows *a fortiori* that the plaintiff as a named payee cannot recover. It is quite clear, therefore, that the expression of opinion of the late Lord Chief Justice, that a payee was never a holder in due course, was a *dictum* only, and, moreover, as his remarks on the other part of the case appear quite unanswerable, the case could not well have been appealed, and, in fact, was not appealed; so that his *dictum* could not well be questioned in that case. It appears to us that the late Lord Chief Justice over-

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looked the definition of "holder" in § 2, which is, "'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore, in § 29, it is necessary to read holder as including payee as well as indorsee, and to read it, "A holder in due course is a payee or indorsee who," etc. That being so, the only words in § 29 which can be said to indicate that a payee cannot be a holder in due course are those in subsec. (b): "And that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." But if the word "payee" had been expressed in the earlier part of the section, it would be clear that this means, "if negotiated to him he had at the time no notice," etc. On the whole, therefore, we are not prepared to hold that a payee of a note can never be a holder in due course; but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice to do so on the case before him.

The real point in the present case after all is, Can we hold that this note was "negotiated" to the plaintiff within the meaning with which the words are used in the proviso to the 20th section? And as to this, we certainly have the opinion of the late Lord Chief Justice that a delivery to a payee for value is not a "negotiating" within the meaning of the act. In [**373**] the 31st section it is said, "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." Does this mean only from one person who is holder to another, or may the person transferring be an agent in possession of the bill otherwise than as holder, whose delivery constitutes the receiver a holder? And even if that cannot be the meaning in the 31st section, may it not be possible to say that in the 20th section "negotiated to a holder in due course" means no more than delivered to a person in such a way that he thereupon becomes a holder in due course? This is the argument of Mr. Arthur Powell for the plaintiff, and he quotes from the Imperial Dictionary a meaning of "negotiate" which might cover the present case. He also points out that, if this note had been payable to Anderson's order and indorsed by him to the plaintiff, or if it had been, by the form in which it was drawn, or by a blank indorsement, payable to bearer, the plaintiff could clearly have recovered on it. If the production by Ander-

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son of the promissory note in either of those forms would have made it unnecessary for the plaintiff to inquire into Anderson's authority to deal with it, it certainly is odd that the production of a note with plaintiff's own name in as payee should be a matter which plaintiff must inquire into and ascertain the extent of Anderson's authority before he could safely take it. The fact that plaintiff's name was there would be more likely to lull suspicion on his part than to arouse it. Mr. Powell contends that the present case clearly comes within the mischief which the proviso in the 20th section was intended to meet, and suggests that we should not be straining the words in putting on them the meaning for which he contends. On the other hand, we have to deal with the points raised by Mr. Bruce Williamson, in his argument for the defendant, that the issuing of a bill or note to the first holder stands on a different footing altogether from the transfer of it from one holder to another, because, when the first holder takes it, it has not become part of the mercantile currency of the country, to use an expression found in some of the cases. He contends that the rule that one holder of a negotiable instrument can give a [374] better title to it than he himself possessed is based upon the view that negotiable instruments are currency, and that it is on their passing from hand to hand, and not on their coming into being, that negotiable instruments acquire their special validity in the hands of a holder in due course. Even if the payee of a note may be a holder in due course, the question whether he is or not depends upon the actual state of facts as between him and the maker of the note; and the contract between the payee and the maker, though no doubt it has some incidents, such, for instance, as days of grace written into it by the law merchant, yet is governed more by the ordinary law of contracts than by the law merchant, and in particular that the element of negotiability in no way enters into the contract between maker and payee. There is much to support this argument in the bills of exchange act. For instance, delivery to the payee being required to complete the contract, it is said in § 21, subsec. 2, that "as between immediate parties, and as regards a remote party other than a holder in due course, the delivery (a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing as the

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case may be." Payees and holders not in due course are, therefore, put on the same footing as regards proof of authority of the person handing them the bill. In the present case, therefore, the delivery of the note to the plaintiff must, in order to enable him to recover, be under the authority of the defendant. It certainly was not so delivered by the defendant's actual authority, and cannot be said to have been delivered under his authority by reason of the ostensible authority with which Anderson had been clothed (to use Lord Bowen's words) by the signature in blank. Mere possession of a promissory note complete and regular on the face of it, and payable to a named payee, would not be conclusive evidence that the maker had given authority to the person in whose possession it was to deliver it to the payee, because the facts might possibly be as in *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637, or as in *Foster* v. *Mackinnon, supra,* or *Lewis* v. *Clay* (1897) 67 L. J. Q. B. N. S. 224, 77 L. T. N. S. 653, 46 Week. Rep. 319, 14 Times L. R. 149. As to this we think that, if the note had been [**375**] placed by the maker in another person's hands with authority to deal with it in some way or other, that would be sufficient to make a delivery under the authority. A question very similar to this is dealt with by Vaughan Williams, L.J., at some length in his judgment in the recent case of *Farquharson* v. *King* [1901] 2 K. B. 697, at p. 713, 70 L. J. K. B. N. S. 985, 49 Week. Rep. 673, 85 L. T. N. S. 264, 17 Times L. R. 689, where he deals with the cases of *Henderson* v. *Williams* [1895] 1 Q. B. 521, 64 L. J. Q. B. N. S. 308, 14 Reports, 375, 72 L. T. N. S. 98, 43 Week. Rep. 274, 11 Eng. Rul. Cas. 105 and *Brocklesby* v. *Temperance Building Society* [1895] A. C. 173, 64 L. J. Ch. N. S. 433, 11 Reports, 159, 72 L. T. N. S. 477, 43 Week. Rep. 606, 59 J. P. 676. If here the defendant had signed the note in the form it ultimately took as a promissory note for 30*l.* payable to the plaintiff, but had instructed Anderson only to deliver it to the plaintiff on the plaintiff giving him 29*l.* for it, we think that, if Anderson had delivered it contrary to those instructions in exchange for 25*l.* only, it would have been a good delivery "under the authority" of the defendant to satisfy the 21st section. It would not have been necessary for the plaintiff to inquire in that case as to any

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limit of Anderson's authority; but it is not so clear that it was not necessary for him to do so on the facts of this present case, because there does not seem to have been any actual authority by the defendant to Anderson to deal with the note at all. He had nothing but that authority which the defendant conferred by signing his name on stamped paper,—that is to say, only his authority which the law merchant, or now the bills of exchange act, attributes to that signature. Anderson, if agent of the defendant at all, was only agent to fill up the paper, and, if the question were to be determined altogether apart from the law merchant and the bills of exchange act, we should have to say that there was here no binding contract at common law whereby the defendant promised the plaintiff that, if the plaintiff would give 25*l.* to Anderson for the defendant, he, the defendant, would pay 30*l.* to the plaintiff in a month.

We have been very reluctant to come to the conclusion that the judgment in favor of the defendant in this case was right, because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular on the face of it honestly and for value; [376] but, after carefully considering the matter, we have come to the conclusion that we should be unfairly straining the words if we did not hold that "negotiated" in the proviso at the end of the 20th section meant transferred by one holder to another. It is to be observed that the bills of exchange act in § 2 defines "issue" as meaning "the first delivery of a bill or note complete in form to a person who takes it as holder." Here Anderson clearly issued the note to the plaintiff within the meaning of this definition. There is therefore a technical word defined and used in the act to mean that which Anderson did here, and the appropriate words to have used in the proviso to § 20, if it had been intended to include this case, would have been "if such instrument after completion is issued or negotiated to a holder in due course." Those are not the words, and, although we think that the present case might possibly have been decided in the plaintiff's favor before the bills of exchange act was passed, we think that we cannot consistently with the meaning of "issue" and "negotiate" in the act say that the present case is covered by the words used in the proviso. That being so, it falls within the

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first part of the 2d subsection of § 20; and as the authority of the defendant was not strictly followed he is not liable.

We think, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Francis Miller & Steele, for Dickinson, Miller, & Dickinson, Newcastle-upon-Tyne.*

Solicitors for defendant: *Stokes & Stokes, for Criddle & Criddle, Newcastle-upon-Tyne.*

Note.—For annotation of the question involved in the foregoing case, see note following *Smith* v. *Prosser, post,* 682.

[ENGLISH COURT OF APPEAL.]

LLOYD'S BANK, LIMITED, *v.* COOKE and Others.

[1907] 1 K. B. 794.

Also Reported in 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429.

Negotiable instrument — Promissory note — Signature in blank — Authority to fill up note to limited amount — Excess of authority — Advance by payees on faith of note — Estoppel — "Holder in due course" — Negotiation — Bills of exchange act 1882 (45 & 46 Vict. chap. 61), § 20.

Where a defendant in an action brought by the payees of a promissory note against him, as maker of the note, had signed his name on a blank stamped piece of paper, and had intrusted the paper to another person with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs and deliver it to the plaintiffs as security for an advance to be made by them, and that person had fraudulently filled the paper up as a promissory note for a larger amount and obtained by means of it an advance of that amount from the plaintiffs, who had no notice of the fraud:—

Held, that the defendant was estopped from denying the validity of the note as between himself and the plaintiffs, and therefore the action was maintainable against him for the full amount of the note.

Herdman v. *Wheeler* [1902] 1 K. B. 361, *ante,* 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, discussed and distinguished.

(March 1, 1907.)

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APPLICATION by the plaintiffs for judgment or a new trial in an action tried before Lawrance, J., and a jury.

The action was brought upon a joint and several promissory note for 1,000*l.* by the plaintiffs as payees of the note against the defendants as makers of it.

The facts as appearing from the evidence and the answers of the jury to questions left to them were as follows:—

The defendant Thomas Henry Cooke had an account with the plaintiffs' bank, and the note had been given to the plaintiffs by him as security for an overdraft for 1,000*l.* On applying to them for the overdraft, he had suggested that he could procure the firm of which he was a member and a relative named Sanbrook to join with him in signing a promissory note by way of security for the advance, and the plaintiffs agreed to advance the money on that security. It appeared that the defendant Cooke had thereupon gone to Sanbrook, who was one of the defendants in the action, and, stating that he was applying for an advance of 500*l.* from the plaintiffs' bank, asked Sanbrook to join in giving promissory notes by way of security for it. On Sanbrook's [795] agreeing to do so, Cooke produced two blank stamped pieces of paper, to which he induced Sanbrook to put his signature, and which were then handed over to Cooke, it being arranged that he was to fill each of them up as a promissory note payable to the plaintiffs for the amount of 250*l.* It did not appear what had become of one of these pieces of paper; but the other, which was the document upon which the action was brought, was filled up by Cooke as a promissory note for 1,000*l.* payable to the plaintiffs, the stamp upon it being sufficient to cover that amount, and was signed by him with his own and his firm's name. He then handed it to the plaintiffs, who thereupon made the required advance. The jury found that the note was signed by Sanbrook in blank, that the authority given by him to Cooke was to fill up the two notes for 250*l.* each, and that Cooke in filling up the note for 1,000*l.* acted fraudulently. The defendant Cooke did not defend the action. It appeared that he had no authority to sign the promissory note on behalf of the other members of his firm, and judgment was accordingly given for them; and, on the authority of *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante,* 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S.

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48, 50 Week. Rep. 300, the learned judge gave judgment for the defendant Sanbrook.

Montague Lush, K.C., and **J. B. Matthews**, for the plaintiffs. The plaintiffs are entitled to judgment against the defendant Sanbrook. If it were necessary, the plaintiffs would be prepared to contend that the decision in *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante*, 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, is wrong; but it is not really necessary for the present purpose to question that decision, because it does not govern this case. It was held in *Herdman* v. *Wheeler*, *supra*, that, in a case like this, there had not been a negotiation of the note, and therefore the case did not come within the proviso to § 20, subsec. 2, of the bills of exchange act 1882, so as to enable the plaintiff to recover on the note. It is contended that in this case, apart from the provisions of the bills of exchange act 1882, on which *Herdman* v. *Wheeler* was decided, and upon the principles of the common-law doctrine of estoppel applicable to all other transactions as well as those embodied in negotiable instruments, the defendant Sanbrook was under the circumstances estopped from denying that Cooke had [**796**] authority to fill up the note for the amount of 1,000*l*. There are rights peculiar to the case of negotiable instruments, which arise by virtue of the law merchants as regards the bona fide indorsees for value of such instruments, and are dealt with by the bills of exchange act 1882, and which may perhaps be put as resting on estoppel; but there is nothing in the bills of exchange act 1882, to except negotiable instruments from the common-law doctrine as to estoppel stated by Ashhurst, J., in *Lickbarrow* v. *Mason* (1787) 2 T. R. 63, 4 Eng. Rul. Cas. 756, which before the act would, in a case like this, clearly have applied as between the immediate parties to a negotiable instrument. In the bills of exchange act 1882, which had for its object the codification of the law peculiar to negotiable instruments, it was of course necessary to deal with the estoppels arising out of the law merchant as regards indorsees, but it was not necessary to deal with an estoppel arising at common law, and which does not depend on any peculiar property of a negotiable instrument. Therefore the doctrine *expressio unius alterius exclusio* is not applicable as regards § 20 of the bills of exchange act. In *Herdman* v. *Wheeler* [1902]

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1 K. B. 361, *ante*, 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, for some reason or other, the question of a common-law estoppel does not seem to have been really argued, and therefore no such question was decided. It seems probable that the point was not open in that case, because it could not be shown that any authority had been given to the fraudulent person to fill up the note as payable to the plaintiff, but only to fill it up as payable to himself. However that may be, the question was never discussed. The cases clearly show that, prior to the bills of exchange act 1882, a person who signed a blank stamped piece of paper, and handed it to a person whom he authorized to fill it up as a negotiable instrument, in order that money might be raised on it, was estopped from denying that he had authorized that person to fill it up for the amount which appeared on the instrument. In *Brocklesby* v. *Temperance Permanent Building Society* [1895] A. C. 173, 64 L. J. Ch. N. S. 433, 11 Reports, 159, 72 L. T. N. S. 477, 43 Week. Rep. 606, 59 J. P. 676, it was decided that, where securities are handed by the owner to an agent, who is authorized to raise a certain sum on them, and the agent fraudulently deposits them as security [**797**] for a larger amount, and appropriates the difference, the owner of the securities is estopped from denying that the agent had authority to raise the larger sum. The principle acted on was that, where an agent is intrusted with securities, and is authorized to use them in carrying out the kind of transaction which he did carry out, the fact that a limit was imposed on his authority, unknown to the person who advanced money on the faith of the securities, does not affect that person's right to recover the amount of the advance from the principal. Here Cooke was authorized to procure an advance of 500*l.* by filling up the blank papers, and was therefore carrying out the kind of transaction which he was authorized to carry out; and consequently the case clearly comes within the principle acted on in *Brocklesby* v. *Temperance Permanent Building Society, supra.* [They also cited *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124; *Union Credit Bank* v. *Mersey Docks and Harbour Board* [1899] 2 Q. B. 205, 68 L. J. Q. B. N. S. 842, 81 L. T. N. S. 44, 4 Com. Cas. 227; *Garrard* v. *Lewis*

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(1882) 10 Q. B. D. 30, 47 L. T. N. S. 408, 31 Week. Rep. 475; *Swan* v. *North British Australasian Co.* (1863) 2 Hurlst. & C. 175, 5 Eng. Rul. Cas. 140; *Farquharson Brothers* v. *King & Co.* [1901] 2 K. B. 697, 70 L. J. K. B. N. S. 985, 49 Week. Rep. 673, 85 L. T. N. S. 264, 17 Times L. R. 689, [1902] A. C. 325, 71 L. J. K. B. N. S. 667, 51 Week. Rep. 94, 86 L. T. N. S. 810, 18 Times L. R. 665; *Babcock* v. *Lawson* (1879) 4 Q. B. D. 394, 48 L. J. Q. B. N. S. 524, 27 Week. Rep. 866; *Carr* v. *London and North Western Ry. Co.* (1875) L. R. 10 C. P. 307, 44 L. J. C. P. N. S. 109, 31 L. T. N. S. 785, 23 Week. Rep. 747; *Nash* v. *De Freville* [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 48 Week. Rep. 434, 82 L. T. N. S. 642, 16 Times L. R. 268.

Amphlett, K.C., and **H. M. Adler**, for the defendant Sanbrook. *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante*, 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, covers the present case. In this case there was no negotiation of the note, and the plaintiffs were not holders in due course; and consequently they do not come within the terms of the proviso to § 20, subsec. 2, of the bills of exchange act 1882, which only applies to instruments which after completion are negotiated to a holder in due course. That being so, it follows that the plaintiffs cannot enforce the note by reason of subsec. 2, which provides that "in order that any such instrument"—*i. e.*, one originally signed in blank—"when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given." See [**798**] *Herdman* v. *Wheeler, supra.* The bills of exchange act 1882 was a codifying act, intended to exhaust the law relating to bills of exchange, promissory notes, and cheques. See *Bank of England* v. *Vagliano Brothers* [1891] A. C. 108, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695; and, that being so, § 20 must be taken to cover all the cases "where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into" such an instrument. Section 20 deals with the cases in which an estoppel arises with regard to such an instrument, and the

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principle *expressio unius alterius exclusio* applies. If the common-law doctrine of estoppel was to continue to apply to negotiable instruments, there seems to have been no reason for the insertion of such a provision as the proviso to § 20, subsec. 2, in the act. With regard to the law before the bills of exchange act 1882, it must be admitted that there are *obiter dicta* in judgments which may appear favorable to the view put forward by the plaintiffs, but the cases of this kind, in which it was actually held that the plaintiff could recover on the instrument, appear to have all been cases in which it had been negotiated, and was in the hands of a bona fide indorsee for value without notice. Until an instrument such as this has been negotiated, and as between the immediate parties to it, it stands on the same footing at common law as any other document, such as a transfer or conveyance, which was signed in blank; and various authorities show that the mere fact that a defendant has put into the hands of a person means of committing a fraud does not estop him at common law from denying the validity of the document. *Lewis* v. *Clay* (1897) 14 Times L. R. 149, 67 L. J. Q. B. N. S. 224, 77 L. T. N. S. 653, 46 Week. Rep. 319; *Awde* v. *Dixon* (1851) 6 Exch. 869, 20 L. J. Exch. N. S. 295. The term "negotiated" is not applicable to the delivery of a negotiable instrument as between immediate parties. In *Brocklesby* v. *Temperance Permanent Building Society* [1895] A. C. 173, 64 L. J. Ch. N. S. 433, 11 Reports, 159, 72 L. T. N. S. 477, 43 Week. Rep. 606, 56 J. P. 676, the documents intrusted to the agent were the title deeds of land, the possession of which may be taken prima facie to indicate a title to deal with the land. [They also cited *Ex parte Swan* (1859) 7 C. B. N. S. 400, 30 L. J. C. P. N. S. 113; *France* v. *Clark* (1884) 26 Ch. D. 257, 53 L. J. Ch. N. S. 585, 50 L. T. N. S. 1, 32 Week. Rep. 466; *London and South Western Bank* v. *Wentworth* (1880) 5 Ex. D. 96, 49 L. J. Exch. N. S. 657, 42 L. T. N. S. 188, 28 Week. Rep. 516.

[**799**] **Montague Lush**, K.C., for the plaintiffs, was not called upon to reply.

Collins, M.R.: This is a case of some importance and difficulty, more especially having regard to the fact that, from one point of view, it might involve the question whether the consid-

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ered judgment of the Divisional Court in *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante,* 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, upon the authority of which the learned judge at the trial acted, was correct. The action is brought by the payees against the makers of a promissory note, but the only question that arises on this appeal is with regard to the liability of the defendant Sanbrook. The question arises in the following manner: The defendant Cooke, a fraudulent person in need of money, induced the defendant Sanbrook to sign two blank stamped pieces of paper for the purpose of enabling him to obtain an advance of 500*l.* from the plaintiffs' bank. The filling up of the pieces of paper so signed was left to Cooke, it being agreed that he was to fill each of them up as a promissory note payable to the plaintiffs for 250*l.* Cooke filled up one of them, upon which the present action is brought, as a promissory note for 1,000*l.* payable to the plaintiffs, and, upon that being handed to the plaintiffs, they gave him credit for the sum of 1,000*l.* The question is whether the plaintiffs can recover as against Sanbrook upon that document or not. The case as developed on the pleadings stands thus. The defendants are sued as makers of the note. The defendant Sanbrook alleges that it was filled up as it was by the defendant Cooke without his authority. The plaintiffs reply that, having regard to the circumstances under which his name came to be upon the note and under which they advanced their money, he is estopped from setting up that defense.

The question appears to me to be purely one of estoppel at common law. It has been contended that the common-law doctrine of estoppel does not apply, and that, in the case of a negotiable instrument, the rights of the parties must be ascertained solely by reference to the provisions of the statute relating to such instruments, and that, upon the true construction of those provisions, the plaintiffs cannot maintain the action against [800] the defendant Sanbrook. As an authority for that proposition, and as governing this case, *Herdman* v. *Wheeler, supra,* was cited. The circumstances of that case were very nearly the same as those of the present case, though possibly some distinction might be suggested; and it was there held that no action could be maintained by the payee of the note against the maker.

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That case involved the consideration of the true construction of the bills of exchange act 1882, and the question whether, upon that construction, the plaintiff was a "holder in due course" of the note, or a person to whom it had been "negotiated;" and the court were of opinion that, under the circumstances of the case, there had been no negotiation of the note, and therefore the plaintiff was not in a position to maintain an action upon it, and they gave judgment accordingly. I do not think it is necessary for us in the present case to treat the rights of the parties as having to be ascertained by reference to the provisions of the bills of exchange act 1882, which were considered in *Herdman* v. *Wheeler,* because, in my opinion, the common-law doctrine of estoppel applies, and the rights of the parties may be decided by reference to that doctrine, without giving any opinion as to the correctness of that decision. At the trial this case seems to have been decided entirely on the authority of *Herdman* v. *Wheeler,* and the question of the existence of an estoppel at common law does not appear to have been discussed. Therefore, if we arrive at a different conclusion from the learned judge at the trial, we shall not really be impugning anything that he said, because his mind never seems to have been directed to the question of estoppel.

That the doctrine of estoppel is applicable to circumstances such as existed in this case appears to me to be conclusively established by an authority which we could not question if we were disposed to do so, namely, the decision of the House of Lords in *Brocklesby* v. *Temperance Permanent Building Society* [1895] A. C. 173, 64 L. J. Ch. N. S. 433, 11 Reports, 159, 72 L. T. N. S. 477, 43 Week. Rep. 606, 59 J. P. 676. The headnote in that case is as follows: "Where a principal intrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities, and fraudulently appropriates the difference (the lender acting [801] bona fide and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry." That case seems to me to be a stronger one than the

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present; and, unless the doctrine of estoppel is excluded here by reason of the fact that in this case the document was, or was intended to become, a negotiable instrument, it appears to me to be conclusive of the present case. Here the defendant Sanbrook signed a paper which he intended to be made use of as a security for an advance, and handed it to the defendant Cooke, authorizing him, as his agent in effect, to fill it up and raise money upon it. Cooke exceeded the authority so given to him, because, instead of confining himself to the authorized amount, he raised a larger sum of money upon the instrument. That appears to me to be in substance precisely what happened in the case of *Brocklesby* v. *Temperance Permanent Building Society, supra.* It was there held that the lender, who had advanced to the fraudulent agent, on the faith of certain securities intrusted to him for the purpose of raising money upon them, a larger amount than he was authorized to borrow, was nevertheless entitled to hold the securities until the whole sum of money which he had advanced was paid. It seems to me to follow that in this case, as between the plaintiffs and the defendant Sanbrook, who had authorized Cooke to fill up the paper signed by him and obtain an advance from the plaintiffs upon the faith of it, the plaintiffs are entitled to treat the whole sum of 1,000*l.* as properly advanced to Cooke by his authority, and therefore as recoverable by the plaintiffs from him. It makes no difference, as it seems to me, in point of principle, that the particular remedy which the lender was, in the case of *Brocklesby* v. *Temperance Permanent Building Society,* seeking to assert was the right to hold the securities by way of lien until the whole of the money advanced was paid, whereas in the present case the plaintiffs are asserting a right to sue the person who authorized the fraudulent agent to deal with the security for the whole amount advanced by them. What the [802] House of Lords decided in principle was that the lender is in such a case entitled as against that person to repayment of the whole sum advanced. So looked at, that case appears to me to show that, apart from the construction of the sections of the bills of exchange act 1882, upon which the case of *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante,* 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, turned, at common law there is an effectual estoppel as against a person

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who, like the defendant Sanbrook, has intrusted an agent with securities for the purpose of obtaining on the faith of them an advance of money up to a certain amount, even though the agent uses them as the means of obtaining a larger advance. The case of *Brocklesby* v. *Temperance Permanent Building Society, supra,* appears to me to be a direct authority on the facts of the present case.

So far from the fact that the document, which was handed to the agent for the purpose of being used as a security, was a negotiable instrument, or was intended to become one, being a reason why the lender of the money should be placed in a worse position for asserting a right on the ground of estoppel, it appears to me to be quite the contrary. I think that all the elements which form the foundation of the estoppel are more easily visible where the instrument which is handed over to be used as a security for an advance is in the form of a negotiable instrument than where it is otherwise; for the intention that the security should be used as a means of raising money is more clearly indicated where the document is in its very nature one which is intended to be transferable from hand to hand as a security for money. The proposition is well established by many cases that a person who puts his name on a blank paper stamped as a negotiable instrument incurs large responsibilities towards anyone who may make an advance on the faith of his signature. This has been frequently the subject of observation in the courts. I will only refer to one passage as indicating the attitude of the courts on this matter. In *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525, at p. 531, 4 Eng. Rul. Cas. 637, Brett, L.J., said: "The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will [803] cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable." It seems to me that these observations are applicable to

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the instrument in the present case, which, even if it cannot be considered as having been negotiated, appears to me to stand in the same category as if it had been, for the purpose of raising all those implications on which this particular ground of estoppel is founded. It was intended to have all the properties of a negotiable instrument, and as such to be capable of passing from hand to hand as part of the currency, for the purpose of raising money upon it, and the fact that it cannot be treated as having been negotiated does not appear to me to affect the particular liability here asserted. There is nothing, in my opinion, in the law as to negotiable instruments as contained in the bills of exchange act 1882, to prevent the transaction in the present case from being subject to this common-law doctrine of estoppel, because the document which was handed over for the purpose of procuring the advance was in the form of a negotiable instrument. I do not think that, in deciding as I do, it is necessary to differ from the judgment in *Herdman* v. *Wheeler, supra.* I doubt whether in that case the doctrine of estoppel could have been set up by the plaintiff. I need not, therefore, discuss the grounds of the decision in that case, and I think we may rest our decision on *Brocklesby* v. *Temperance Permanent Building Society, supra.* Consequently I will pronounce no opinion on the question whether the plaintiffs were entitled to succeed as against the defendant Sanbrook by virtue of the provisions of the bills of exchange act 1882. On these grounds I think that the application of the plaintiffs for judgment must be allowed.

Cozens-Hardy, L.J.: I am of the same opinion, and have not much to add. Like the Master of the Rolls, I desire to keep [**804**] an open mind as to the correctness of the decision in *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante,* 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 348, 50 Week. Rep. 300, because, from the point of view which I take, it is not necessary to discuss that case. It seems to me that the present case can, and ought to, be decided by the application of the well-known doctrine of estoppel by conduct, a doctrine which is applicable to all transactions, unless it is excluded by some express statutory provision, and which really is, after all, only a branch of the law of evidence. I find it difficult to see what possible answer can

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be made to the claim of plaintiffs who, like those in the present case, produce a promissory note which admittedly bears the signature of the defendant, who admittedly signed it in blank and handed it over to another person with the express intention that the amount to be payable on it and the name of the plaintiffs as payees should be filled in by that person, and that money should be borrowed upon it by him from the plaintiffs. A document which, under such circumstances as these, has been signed and handed to an agent for the signer—for that was really Cooke's position in the matter—for the purpose of his borrowing money on it, must, in my judgment, on the ground of estoppel, be treated as having been filled up in accordance with the authority given by the signer of it. The essential principle of the law of estoppel being that a person cannot be allowed to set up the truth of the matter in a case where by his conduct he has rendered it unjust and unfair that he should do so, I think that a person who has acted as the defendant Sanbrook did cannot, as against those who advanced money on the faith of the instrument signed by him, be allowed to say that his agent exceeded the authority given to him. It is urged that, the document in question here being a negotiable instrument, the doctrine of estoppel is in this case excluded, because its application, as regards such instruments, is limited to the cases mentioned in the bills of exchange act 1882, § 20. Whether this note can be considered to have been negotiated or not, it is not, I think, necessary to decide; but the view so put forward for the defendant does not appear to have been that taken by the Court of Appeal in *Nash* v. *De Freville* [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 48 Week. Rep. 434, 82 L. T. N. S. 642, 16 Times L. R. 268, in proof of which I may [**805**] refer to the first part of the judgment of Collins, L.J. ([1900] 2 Q. B. at pp. 84–6), as he then was, in which he seems to have fully considered the application of the common-law doctrine of estoppel to that case, and to have stated that, in his opinion, the case was governed by the doctrine of estoppel, though he afterwards proceeded further to deal with it from another point of view. I think, therefore, that on the point with regard to estoppel, which does not seem to have been discussed in the court below, the plaintiffs are entitled to judgment against the defendant Sanbrook.

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Fletcher Moulton, L.J.: I am of the same opinion, and I agree with the reasons given by the Master of the Rolls and Cozens-Hardy, L.J.; but I wish to add a few observations with reference to the argument based upon § 20 of the bills of exchange act 1882, which was pressed upon us by the counsel for the defendant Sanbrook. In cases in which a blank stamped paper has been signed and delivered by the signer in order that it may be converted into a bill, subsec. 2 of § 20 provides that "in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given." It was urged that this provision is an absolute limitation upon all claims based on such an instrument (whether by way of estoppel or otherwise), and that the only way in which a person so claiming can escape from that limitation is by bringing himself within the proviso to the subsection, which provides that "if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given," and it was contended that the plaintiffs had failed to bring themselves within the words of this proviso because they were not "holders in due course."

In order to agree with this view, one would have to come to the conclusion that it was intended by the bills of exchange act 1882, to make an essential change in the law with regard to [806] negotiable instruments by shutting out the payee of such an instrument, who had given full value without notice of anything wrong, from the advantages of the position of a bona fide holder for value. Before the bills of exchange act 1882, it would, in my opinion, have been impossible to contend that a payee of a promissory note who took it under circumstances such as existed here was not entitled to recover the full amount of the note from the maker of it. A long line of most emphatic judgments shows that, before the act, a person who, like the defendant Sanbrook, chose to sign a bill or note in blank, and hand it to another person to be filled up, would, under circumstances such as exist in this case, be liable to the payee for the full amount for which

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the instrument was filled up, provided that it was not greater than the stamp would cover, so that an action such as this would then have been an undefended action. The contention of the counsel for the defendant amounts, therefore, to saying that the act has made this important change, namely, that it has taken away the right of a payee to recover under such circumstances, leaving only the rights of an indorsee in this respect unchanged.

I cannot accept that view. I can see no indication in the act of any intention to make such a radical change in the law, a change which does not commend itself to one's sense of justice, and which, if intended, would surely have been made formally and explicitly, and not left to be gathered by mere implication. And, apart from the absence of any indication that such a serious change in the law is intended to be made, there are many things in the act which lead me to the opposite conclusion. In the first place, I am satisfied that the term "holder in due course," which is used in the act, is intended to be the equivalent of the term "bona fide holder for value," which was used prior to the act, and which would, in my opinion, have included a payee who had given full value for the bill or note in good faith. This appears from the judgment of Lord Selborne in *France* v. *Clark* (1884) 26 Ch. D. 257, at p. 262, in which he uses the expression "bona fide holder for value" in a sense which must include a payee who has given value in good faith. He says: "The person who has signed a [807] negotiable instrument in blank or with blank spaces is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document after it has left his hands by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a bona fide holder for value without notice; but it has been repeatedly explained that this estoppel is in favor only of such a bona fide holder." Now, as I have said, the courts always held a payee entitled to the benefit of this estoppel if he took the instrument bona fide and without notice, and therefore we have the authority of Lord Selborne in favor of the view that the term "bona fide holder for value" may include a payee; and, if the term "holder in due course" in the bills of exchange act 1882 is intended to be the equivalent of "bona fide holder for value," it must include such a payee.

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But it will perhaps be said that one ought not primarily to be guided in the interpretation of such an act by considerations of what was the previous state of the law. The act in its definition clause defines in a statutory manner the meaning of the terms used in it, and, although there is a strong presumption against any serious change in the general law being intended, it is, after all, a question of the interpretation of the statute, and these definitions must be implicitly followed. This is true, but the application of this principle only strengthens the view I have enunciated. When I look at the definition of "holder" in the bills of exchange act 1882, § 2, I find that, so far from its indicating any intention to create a difference of status between a holder who is a payee and a holder who is an indorsee, or to put a payee in any worse position in this respect than an indorsee, the contrary is the case. The act takes special care to place them on an equality, for it defines "holder" as meaning the "payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore, unless the context compels us to do otherwise, we must construe the term "holder" as including a payee. I next find that in § 30, subsec. 2, of the act, it is provided that "every holder of a bill is prima facie deemed to be a holder in due course," and that, if it is wished to dislodge him from that position, it must be shown that there [**808**] has been fraud or some other like circumstance in connection with the bill before it reached his hands, and even this only shifts the burden of proof and makes it incumbent on him to prove that he gave value in good faith.

These provisions specifically give to the payee the prima facie status of a "holder in due course," and, if he can show that value has in good faith been given by him for the bill, that prima facie status cannot be displaced.

It is suggested, however, that these conclusions are negatived by the language of § 29, subsec. 1, which states the conditions under which a person is a "holder in due course." I can find nothing in the language of that subsection which throws any doubt on the view that "holder in due course" would include a payee who has given value in good faith, unless we are to construe the word "negotiated" as being merely equivalent to "indorsed." But, when the definition of "negotiation" given by

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§ 31, subsec. 1, is looked at, it appears clear that the legislature intended to make it apply also to the original operation of transferring the bill to the payee. It lays down that "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." It carefully abstains from prescribing that the transferrer must be a "holder." All that is necessary to constitute "negotiation" of the bill is that it should have been transferred from one person to another in such a manner as to constitute the transferee the "holder of the bill,"—*i. e.*, if we replace "holder" by its definition in the act,—"the payee or indorsee who is in possession of the bill." A cheque, therefore, payable to a particular person, which is handed by the drawer to that person for value, would be "negotiated" within the meaning of the act.

These considerations lead me to the conclusion that the act did not intend to impair the position of a payee as contrasted with that of an indorsee, and that a payee who has given value in good faith is intended to come within its provisions as a "holder in due course" just as much as an indorsee. Finding, therefore, no indication in the act of any intention to interfere with the position of a payee of a negotiable instrument in this respect, I arrive with some confidence at the conclusion that, in [**809**] the circumstances of a case like the present, such a payee since the act still occupies the favorable position which he would have had before the act by virtue of the law of estoppel as applied to a case where a promissory note has been signed in blank by the maker and intrusted to another person to fill up.

Application allowed.

Solicitors for plaintiffs: *May, How, & Chilver, for Lloyd & Son, Leominster.*

Solicitor for defendant, *Alfred Jonas, for John Moore, Hereford.*

Note.—For annotation of the question involved in the foregoing case, see note following *Smith* v. *Prosser, post,* 682.

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[ENGLISH COURT OF APPEAL.]

SMITH *v.* PROSSER.

[1907] 2 K. B. 735.
Also Reported in 97 L. T. N. S. 155, 23 Times L. R. 597.

Negotiable instrument — Promissory note — Signature in blank — Delivery to agent for safe custody — Fraudulent negotiation of note by agent — Rights of bona fide indorsee for value.

The defendant in South Africa, being about to leave for England, gave to two persons a power of attorney to act for him in his absence. He further, in anticipation of the possibility of funds being suddenly required during his absence, signed his name on two blank unstamped pieces of paper, which were lithographed forms of promissory notes, and handed them to one of the two agents with instructions that they should be retained in the custody of his attorney until the defendant should, by telegram or letter from England, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. After the defendant had left South Africa, the attorney to whom he had handed the documents, without waiting for instructions from the defendant (which were in fact never given), and in fraud of the defendant, filled in the blanks in the documents so as to make them appear to be promissory notes for considerable sums, and sold them to the plaintiff, who took them honestly and in good faith, and without notice of the fraud, and gave full value for them. For the purpose of suing upon them in England the notes were stamped as foreign bills:—

Held, that, as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff, and that the action was not maintainable.

Lloyd's Bank, Ld. v. *Cooke* [1907] 1 K. B. 794, *ante*, 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182, distinguished.

(June 5, 1907.)

APPEAL from a decision of Grantham, J., in an action tried without a jury.

The action was brought against the defendant as the maker of two promissory notes for 268*l.* 6*s.* 8*d.* and 210*l.*, which were dated July 16, 1902, and were respectively payable two months and three months after date. From the facts proved at the trial, it appeared that the defendant was, shortly before the

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date in question, living in South Africa, being largely interested in mining concessions and mining properties. Being obliged to go to England on business connected therewith, and being desirous of providing funds for business disbursements which he anticipated might be necessary during his absence, he [736] executed a power of attorney in favor of two persons, named Telfer and Wilson, and signed the two documents sued upon as promissory notes. When signed by the defendant they were merely unstamped pieces of paper, bearing upon the face of them lithographed forms of promissory notes, with blanks for date, amount, name of payee, etc.; none of these blanks were filled up by the defendant, who merely wrote his name in the ordinary place for the maker's signature. The documents, bearing at the time no writing upon them beyond the defendant's signature, were handed by the defendant to Telfer, with instructions substantially amounting to a direction that they should be retained in the custody of his attorneys until the defendant should either by telegram or by letter from England give instructions that they should be issued as promissory notes for the purpose of raising money upon them and as to the amounts for which they should be filled up. Shortly after the defendant had left South Africa for England, Telfer brought the notes to the plaintiff, who carried on business in Cape Town, and asked him to buy them. Telfer was at that time without any instructions from the defendant authorizing him to fill up or part with the documents, and the defendant in fact never gave either Telfer or Wilson instructions to negotiate them. The plaintiff required two additional names on the notes, and Telfer signed them himself and obtained the signature of a man named Robinson; the notes were then bought by the plaintiff at their full value. The details in the notes as to date, amount, etc., had been filled in by Telfer when the plaintiff purchased them, and they were made payable to the plaintiff's order at two and three months after date respectively; the notes were not stamped. Telfer, who died before the trial of the action, used the proceeds of the notes for his own purposes, and, as was found by the judge at the trial, acted throughout with a fraudulent intention. The plaintiff, who was found to have acted honestly and to be a bona fide holder for value without notice of the fraud, came to England about three years after the purchase

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of the notes, and eventually brought the present action, the notes having been stamped as foreign bills for the purpose of suing upon them. Grantham, J., found that the notes had not [737] been properly negotiated to the plaintiff, and that he was not entitled to recover. The plaintiff appealed.

Montague Lush, K.C., and **Reginald Neville**, for the plaintiff. Upon the facts of the case, and upon consideration of the authorities, the plaintiff is entitled to succeed. In *Herdman* v. *Wheeler* [1902] 1 K. B. 361, *ante*, 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, it was decided that, in a case such as this, there being no negotiation of the note, the estoppel provided for by § 20 of the bills of exchange act 1882, which reproduces the law merchant on the subject in the case of bona fide indorsees for value, did not arise; but in *Lloyd's Bank, Ld.* v. *Cooke* [1907] 1 K. B. 794, *ante*, 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182, it was held that, assuming the decision in *Herdman* v. *Wheeler, supra,* to be correct, there was in such a case as this a common-law estoppel which prevented the defendant from denying that he had given authority to the person to whom he had intrusted the paper signed in blank to fill it up for the amount for which he had in fact filled it up, and it would seem that in the later case Fletcher Moulton, L.J., was of opinion that *Herdman* v. *Wheeler* was wrongly decided. In the present case the notes having been signed, issued, and intended to be transferred in South Africa, are foreign notes; and, as § 18 of No. 19 of the Cape of Good Hope Statutes 1893, like § 20 of the bills of exchange act 1882, only applies to paper bearing a stamp which has been signed in blank, no question of a statutory estoppel arises: but the common-law estoppel which was held to have arisen in *Lloyd's Bank, Ld.* v. *Cooke, supra,* also arises in the present case; it is therefore not really material to consider whether there can be said to have been a negotiation of the notes to the plaintiff. The defendant left these instruments signed by him in blank in the hands of Telfer in order that he might fill them up as promissory notes with the requisite amounts for the purpose of raising the money which might be required in order to keep alive mining options in South Africa in which the

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defendant was interested, and for other purposes, while the defendant was absent in England; and therefore, on the principle laid down in *Lloyd's Bank, Ld.* v. *Cooke,* on the authority of *Brocklesby* v. *Temperance Permanent Building* [738] *Society* [1895] A. C. 173, 64 L. J. Ch. N. S. 433, 11 Reports, 159, 72 L. T. N. S. 477, 43 Week. Rep. 606, 59 J. P. 676, he is estopped from denying that Telfer had authority to fill the notes up as he did.

It is true that in this case the notes, when signed, bore no stamp, whereas in the case of English negotiable instruments in which this estoppel has been held applicable the document signed in blank has apparently always borne a stamp at the time of signature, and, as already stated, § 20, subsec. 2, of the bills of exchange act 1882, only applies to blank stamped papers signed and delivered by the signer that they may be converted into negotiable instruments. This, however, is because by the English stamp acts an English negotiable instrument, except in the case of the duty of a penny upon a bill of exchange for the payment of money on demand, had, and has still, to be stamped with an impressed stamp, which must be impressed before execution, otherwise the instrument is void; in the case of an English promissory note it might be essential that it should bear a stamp when signed in blank. The notes in question were unstamped when signed, but they were foreign notes, and by the law of the Cape the duty on negotiable instruments such as these may be paid by means of adhesive stamps, which, it would appear, may be affixed after execution. Therefore the absence of a stamp on the notes when signed could not prevent the estoppel relied upon from arising. The adhesive stamps requisite under English law in the case of promissory notes made out of the United Kingdom were affixed before action. The law of a place abroad as to stamp duty is prima facie a mere fiscal regulation, with which the English courts have no concern. It is only when by the *lex loci contractus* the instrument is rendered void by the absence of a stamp, which does not appear to be the case by Cape law, that the courts in England will take notice of such absence. See *Bristow* v. *Sequeville* (1850) 5 Exch. 275, 3 Car. & K. 64, 19 L. J. Exch. N. S. 289, 14 Jur. 674. By § 72 of the bills of exchange act 1882, where a bill is issued out of the United Kingdom it is

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not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

The insertion of the word "we" before "promise to pay" and [739] the addition of the names of Telfer and Robinson on the back of the notes are not material; they might possibly have been material on the question whether the plaintiff took the notes in good faith, but the judge has found that he did. The plaintiff was not a person likely to be familiar with the law of bills of exchange, and probably thought that Telfer was intended to be a joint maker of the note, and it is not suggested that the plaintiff acted otherwise than honestly and in good faith. The character in which Telfer and Robinson signed appears to have been that of indorsers. *Steele* v. *McKinlay* (1880) 5 App. Cas. 754, 43 L. T. N. S. 358, 29 Week. Rep. 17, 4 Eng. Rul. Cas. 218; but, in whatever capacity they became parties to the note, it cannot be suggested that the insertion of the word "we" prevents the note from being valid as a note made by the defendant, for the addition of the two names on the back of the note did not enhance the defendant's liability. An alteration after signature, if material, no doubt avoids the instrument, but not otherwise. See *Atkinson* v. *Hawdon* (1835) 2 Ad. & El. 628, 4 Nev. & M. 409, 1 H. & W. 77, 4 L. J. K. B. N. S. 85; *Suffell* v. *Bank of England* (1882) 9 Q. B. D. 555, 3 Eng. Rul. Cas. 640. The plaintiff did not know that by the power of attorney another attorney was nominated to act with Telfer. He was entitled to assume, from the fact that the notes were left with Telfer signed by the defendant, that Telfer was authorized to raise the amounts appearing on the notes. [They also cited *Awde* v. *Dixon* (1851) 6 Exch. 869, 20 L. J. Exch. N. S. 295; *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124; *Nash* v. *De Freville* [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 48 Week. Rep. 434, 82 L. T. N. S. 642, 16 Times L. R. 268; *Swan* v. *North British Australasian Co.* (1863) 2 Hurlst. & C. 175, 5 Eng. Rul. Cas. 140; *Ex parte Swan* (1859) 7 C. B. N. S. 400, 30 L. J. C. P. N. S. 113; *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201, at p. 213, 61 L. J. Ch. N. S. 723, 66 L. T. N. S. 625, 41 Week. Rep. 108, 56 J. P. 644; *Barker* v. *Sterne* (1854) 9 Exch. 684, 2 C. L. R. 1020, 23 L. J. Exch. N. S. 201, 2 Week. Rep.

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418; *Stoessiger* v. *South Eastern Ry. Co.* (1854) 3 El. & Bl. 549, 2 C. L. R. 1595, 23 L. J. Q. B. N. S. 293, 18 Jur. 605, 2 Week. Rep. 375; *Russel* v. *Langstaffe* (1780) 2 Dougl. K. B. (4th ed.) 514; *Crutchly* v. *Mann* (1814) 5 Taunt. 529, 1 Marsh. 29; *Cruchley* v. *Clarance* (1813) 2 Maule & S. 90, 14 Revised Rep. 596; Dicey's Conflict of Laws (1906), pp. 602–604; Westlake's Private International Law, 4th ed. p. 272, § 209.]

Arthur Powell, K.C., and **Woolf**, for the defendant. The suggested estoppel does not arise, for the case does not come [**740**] within the principle laid down in *Lloyd's Bank, Ld.* v. *Cooke* [1907] 1 K. B. 794, *ante*, 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182. In order to bring a case within the principle of that decision, and of the authorities on which it was based, it is essential that the instrument signed in blank should have been placed in the hands of the agent with authority to fill it up and raise money upon it. In the present case the notes were placed in the hands of the persons named in the power of attorney, not with authority to raise money upon them, but to keep them as custodians until such time as the defendant should telegraph out instructions as to how to fill them up and the amounts to be raised upon them. Until the defendant did that, Telfer was a mere custodian of the documents, with no authority to deal with them at all. The common-law estoppel suggested by the plaintiff only arises when documents have been intrusted to an agent to be used by him. See per Vaughan Williams, L.J., in *Farquharson Brothers & Co.* v. *King & Co.* [1901] 2 K. B. 697, at p. 713, 70 L. J. K. B. N. S. 985, 49 Week. Rep. 673, 85 L. T. N. S. 264, 17 Times L. R. 689. The decision in *Lloyd's Bank, Ld.* v. *Cooke, supra,* cannot, of course, be questioned in this court; but it does not seem to have been pointed out in that case that what the defendant Cooke did amounted to forgery. See *Rex* v. *Minter Hart* (1837) 1 Moody, C. C. 486, 7 Car. & P. 652; and it is clear from many authorities that forgery by an agent cannot give a good title to a negotiable instrument. The present case comes within the principle of *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637, for here the defendant had never issued the notes intending them to be used. The case of *Brocklesby* v. *Temperance Permanent*

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Building Society [1895] A. C. 173, 64 L. J. Ch. N. S. 433, 11 Reports, 159, 72 L. T. N. S. 477, 43 Week. Rep. 606, 59 J. P. 676, upon the authority of which *Lloyd's Bank, Ld.* v. *Cooke, supra,* was decided, was one in which the agent intrusted with securities used them in carrying out a transaction of the kind which he was authorized to carry out, though he exceeded the limit which was imposed on his authority unknown to the persons with whom he dealt; but in the present case Telfer, in issuing the notes, was not doing an act of a kind which he was authorized to do, for he was not authorized to do anything with the notes until he received instructions from the defendant. In *Baxendale* v. *Bennett, supra,* the instrument was a complete instrument, so that the present [**741**] case is an *a fortiori* case. The authorities show that, if a principal gives an agent authority to fill up as a note a paper signed by him in blank, he cannot be heard to deny the agent's authority for the sum for which the agent fills it up, but no authority shows that the placing of an instrument signed in blank in the hands of an agent estops the principal from denying that he ever gave the agent any authority to fill it up at all. [They cited on this point *Hanbury* v. *Lovett* (1868) 18 L. T. N. S. 366, 16 Week. Rep. 795; *Schultz* v. *Astley* (1836) 2 Bing. N. C. 544, 7 Car. & P. 99, 2 Scott, 815, 1 Hodges, 425, 5 L. J. C. P. N. S. 130; *Carr* v. *London and North Western Ry. Co.* (1875) L. R. 10 C. P. 307, 44 L. J. C. P. N. S. 109, 31 L. T. N. S. 785, 23 Week. Rep. 747; *France* v. *Clark* (1884) 26 Ch. D. 257, 53 L. J. Ch. N. S. 585, 50 L. T. N. S. 1, 32 Week. Rep. 466.]

Secondly, there was evidence that by the Cape of Good Hope stamp laws a promissory note must be stamped before it is negotiated in any way, and that a penalty is imposed for contravening the law in this respect. Prima facie what is prohibited under a penalty is meant to be illegal, and therefore these instruments, not having been stamped before they were negotiated to the plaintiff, must be regarded as void; and it is clear that an English court cannot give effect to an instrument which is void by the *lex loci contractus.*

Thirdly, the plaintiff was informed by Telfer that he was acting for the defendant under a power of attorney, though he did not apparently know that Wilson was by the power nomi-

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nated jointly with Telfer. It is clear that where a person dealing with an agent knows that his authority is in writing he is affected with constructive notice of the contents of the writing, and, if he does not choose to inquire what they are, he takes the risk of the agent's exceeding his authority. If the plaintiff had required to see the power of attorney, he would have seen that Telfer was only entitled to act jointly with Wilson. [They cited on this point *Hatch* v. *Searles* (1854) 2 Smale & G. 147; 24 L. J. Ch. N. S. 22, 3 Week. Rep. 49.]

Montague Lush, K.C., in reply.

Vaughan Williams, L.J.: I do not think that this case is so complicated as it has been described by counsel. I agree, however, that it is necessary to understand clearly what are the [**742**] principles upon which it has been held that a person who signs a promissory note as maker or a bill of exchange as acceptor, or who indorses either of them, is held to be responsible to a bona fide holder for value, even though the document was not a perfect document at the moment when it left the hands of the maker, acceptor, or indorser, as the case may be. A great many authorities have been cited, many of which are decisions prior to the bills of exchange act 1882; and I think I may say generally that the passing of that act, which codified the then existing law, has not altered in any respect material to the present case the law as laid down in the prior authorities. The principal section of the bills of exchange act that has been relied on in argument is § 20, which consists of two subsections and a proviso. Subsection 1 runs: "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit." The expression there employed is "a simple signature on a blank stamped paper," but this changes to "instrument" in subsec. 2, which provides that "in order that any such instrument when completed may be enforceable against any person who became a

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party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact." Then comes the proviso: "Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given." I agree with the contention of Mr. Lush that that section does not really apply in the present case. If we deal with subsection 1, which speaks of a signature on a blank stamped paper, the proviso cannot apply because the instrument was not negotiated after completion; while subsection 2 only applies [**743**] where the filling up has been strictly in accordance with the authority given, which was not the case here.

I will now say a few words about the facts. The defendant intrusted Telfer and another person with certain promissory notes, which were on ordinary lithographed forms with blank spaces in which were to be filled in names and amounts, etc. The defendant signed the notes while they were still in blank; they were at the time unstamped, and they remained unstamped when they were discounted. He in fact deposited the notes with instructions, which, with the attendant circumstances, are thus set out in the judgment of Grantham, J.: "The defendant was engaged chiefly in mining business in South Africa. He had to return to England in the middle of 1902 in connection with his business. Knowing that money might be wanted to pay fees for mining licenses on some of the options which he possessed, and having also other business matters which would require the attention of someone on his behalf on the spot, he gave a power of attorney to two friends, Telfer and Wilson, to act on his behalf, and, in case of a sudden emergency that required money at once, he left the two promissory notes in blank signed by himself to enable the two holders of the power of attorney to fill them up for the required amount on his cabling them from England instructions for so doing. As he could not leave the notes with two persons, he chose Telfer as the person to be intrusted with them, Telfer being considered a most honorable and well-to-do man. Shortly afterwards the defendant left South Africa.

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Telfer, in fraud of the defendant and on false statements made to the plaintiff, asked the latter to buy the notes, which the plaintiff knew were made in blank, telling the plaintiff that he was acting under a power of attorney from the defendant. The plaintiff refused to buy the notes until another name had been put on the back, and Telfer accordingly asked one Robinson, who was much interested in the defendant's affairs, to back the notes, which he did without any consideration at all, believing Telfer's story. The plaintiff made no inquiries as to the terms of the power of attorney. Telfer and Robinson put their names on the back of the notes, and the plaintiff agreed to buy them, and his name was filled in as payee, and he gave [744] Telfer cash for the notes, less a small discount, to which he was fairly entitled." Upon these facts the learned judge gave judgment for the defendant. I entirely agree in the result of the judgment, but I prefer to express my own view as to how that result should be arrived at. I do not say that a point might not be made as to the notice which the plaintiff had when he advanced money against the sale of these notes. A point was in fact made that he had notice that Telfer was acting under a power of attorney, and that the plaintiff ought to have made inquiries; but I do not desire to rest my judgment on that ground, nor do I rest it on the ground that there was no stamp, impressed or adhesive, on the note when Telfer assumed to negotiate it by selling it to the plaintiff.

I propose to deal with the case in this way. Here is a document which was in an incomplete state at the moment of its negotiation. If that note, being in that condition, had been handed to Telfer (and I leave out of consideration for this purpose the fact that Telfer and Wilson were joint attorneys) for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, I am of opinion that prima facie the defendant would have been responsible to a bona fide holder for value who had purchased the note from Telfer as the plaintiff did. In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be

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issued as such. In my opinion this is not a case in which such facts appear. It is plain on the evidence, and on the conclusion arrived at by Grantham, J., that what the defendant really did was to leave South Africa while uncertain that any money would be required for the mining speculations and promotions which he was carrying on, and quite uncertain as to any particular amount being necessary. Under these circumstances he applied to two persons to be his attorneys, and executed a power of attorney under which he gave them very general powers of acting in his absence. I draw no distinction between giving such a power to Telfer alone and giving it to Telfer and Wilson; I [745] treat the case as though Telfer were the only person with whom the notes were deposited. Under those circumstances the defendant came to England, and, being desirous that sums of money should be raised on his behalf if the necessity should arise while he was away, he delivered these notes to his attorney, not as notes to be issued, and which the attorney was from the first to have authority to fill up and issue, but as custodian only, and intending that the notes should not be issued until he sent instructions to that effect from England. Under these circumstances the authorities seem to show that, in the absence of a delivery of notes to an agent with the intention that they shall be negotiated, or at any rate that the agent shall have power to negotiate them, the signer is not responsible even to a bona fide holder for value. I may say at once that the majority of the cases cited to us are not applicable at all, because most of the cases in which the person who signed the instrument was held responsible, although the instruments were negotiated in fraud of him, were cases in which either the instrument was itself complete, or else there was a parting with the instrument either with authority or instructions to the agent to fill it up, or with the more general intention that he should use it for the purpose of raising money by its negotiation. I will therefore only deal with the authorities in regard to intrusting an agent with the possession of a piece of paper which, when handed over to him, is not a complete negotiable instrument, but as to which a question arises as to the authority in fact of the agent to fill it up, or as to an estoppel binding the signer, though he did not sign it or hand it over with the intention that it should be negotiated, because he has

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acted in such a way as to deceive persons who have been induced by his conduct to treat that as an instrument properly negotiated which he did not intend to be negotiated. Examples of such decisions are *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637 and *London and South Western Bank* v. *Wentworth* (1880) 5 Ex. D. 96, 49 L. J. Exch. N. S. 657, 42 L. T. N. S. 188, 28 Week. Rep. 516.

But first I desire to say a word as to the principle on which the person signing is held liable, although he did not intend the document to be dealt with in the manner in which it was in fact [**746**] dealt with. I take it that the mere fact that the signer of a negotiable instrument has been negligent as regards the care taken by him in regard to a signed paper never renders him liable to be estopped from showing the conditions under which he parted with its possession, unless he has so dealt with the instrument or given such instructions with regard to it as raised a duty between himself and the commercial public. Mere negotiation by itself, unless it raises such a duty, cannot raise an estoppel; though it may be true to say that where the fraud of a third party has caused injury to one of two innocent parties, that one must be held liable whose negligence rendered the fraud possible. In that sense negligence is not equivalent to mere carelessness which may cause harm, but it is negligence in the performance of a duty to the person who sets up the estoppel.

The case of *Baxendale* v. *Bennett, supra,* was discussed during the argument. That was a case of a bill of exchange with a blank for the name of the drawer, and across the instrument the defendant wrote his name as acceptor. It was stolen from the acceptor's chambers, and a drawer's name inserted without the acceptor's authority, and passed to the plaintiff as a bona fide holder for value; the acceptor was held not to be liable. In the early part of his judgment Bramwell, L.J., deals with the matter from the point of view that the liability, if any existed, arose by estoppel; but, after discussing the cases of *Young* v. *Grote* (1827) 4 Bing. 253, 12 J. B. Moore, 484, 5 L. J. C. P. 165, 29 Week. Rep. 552, and *Ingham* v. *Primrose* (1859) 7 C. B. N. S. 82, 28 L. J. C. P. N. S. 294, 5 Jur. N. S. 710, with which he did not entirely agree (and which have indeed now ceased to be

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law), he says: "The defendant here has not voluntarily put into anyone's hands the means, or part of the means, for committing a crime. But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then *Bank of Ireland* v. *Evans' Trustees* (1855) 5 H. L. Cas. 389, 3 Week. Rep. 573 shows under such circumstances there is no estoppel. It is [747] true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument." I read that passage because, although that judgment is not so applicable to the present case as is the judgment of Brett, L.J., it makes the latter easier to follow. The latter learned judge says, early in his judgment: "It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it." In the present case the defendant had made the notes, so no such question arises, but it is plain upon the facts that the defendant never authorized the negotiation or the filling in of the amounts. Pursuing his judgment, Brett, L.J., differs from Bramwell, L.J., as to the fact of negligence, and says: "I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up"—if the passage stopped there, it might perhaps assist the plaintiff's argument, but the Lord Justice goes on—"to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up." In the present case it is plain upon the facts that the defendant did not issue, and did not authorize his attorney to issue, the promissory notes; nor did he authorize anyone to fill them up; he merely handed the notes to his attorney and told him that he was to fill them up when he received his

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instructions to do so, which I understand to mean the same as though the defendant had added, "and not otherwise," or had told his attorney not to fill them up until he received instructions from him to do so. Brett, L.J., goes on to say: "He has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes." It is plain that the promissory notes in the present case could not be [748] in like manner current in the sense there given to the expression. Then Brett, L.J., says: "But whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used." In my opinion it is clear that the defendant in the present case did not issue the promissory notes intending them to be used, in the sense in which Brett, L.J., uses those words. The defendant contemplated having to give instructions in the future as to their user, but his intention at the time was to hand them over for the purpose of deposit, not in order that they might be used, they were merely deposited with a statement that they were to be used if and when the defendant gave instructions to that effect. It is unnecessary for me to consider the remainder of the judgment of Brett, L.J., which deals with the authority of *Young* v. *Grote,* and *Ingraham* v. *Primrose, supra,* a question which is now settled.

I ought to say a few words about *London and South Western Bank* v. *Wentworth, supra.* The headnote is in these words: "When a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a person as drawer and indorser, the acceptor cannot, as against a bona fide indorsee for value, adduce evidence to show that either the drawing or indorsement is a forgery." In other words, the defendant in such a case is estopped from setting up that the drawing of the bill was a forgery, and is equally estopped from setting up the defense that the filling in in any way of a blank promissory note is contrary to private instructions given by him to his agent. The reason why I call attention to this case is that again and again in the judgment of the court, which was delivered by Pollock, B., wherever they are dealing with the question whether the defendant was estopped, they state it in such a way as

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excludes the present case. The learned judge says (5 Ex. D. at p. 101): "Let us now see to what extent the principles which are involved in the decision of this question have been considered and settled. Where a man signs his name to a blank stamped piece of paper, and delivers it to another to be negotiated,"—he begins with that qualification,—"this gives him [749] authority to fill it up to the amount which the stamp will cover." Stopping there, I wish to say that, although the stamp is evidence of authority, it is also a limitation of the authority to the amount covered by the stamp. The judgment then proceeds—"treating the signature as that of the acceptor, and if the bill thus completed is indorsed to a holder for value without notice, he is entitled to recover upon it against him who has so signed his name, although the person to whom the blank paper is originally given may have defrauded the man who gave it to him." Then the judgment considers a number of authorities, among them *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637, which I have already discussed.

I need not call attention at greater length to this decision, but if the authorities there cited are looked at it will be found that in every case the party signing the negotiable instrument had parted with it for the purpose of its being negotiated. No one says here that the notes were parted with for immediate negotiation, but it is said that they were parted with in contemplation of instructions as to their negotiation being presently given by the defendant. The case seems to be one which is not covered by any rule deducible from the authorities. Plainly Telfer did that which he was not authorized to do, and it is contended by the defendant that he is entitled to set up that want of authority as a defense to this action. Why should he not do so? It is said that he is not so entitled because he delivered the notes to Telfer with the intention that they should be filled up and at the same time negotiated, and because at the time he informed his attorney that the reason was that he thought he might have occasion hereafter to give him instructions to fill up and negotiate the notes. At the moment when they were handed over, no purpose or intention existed in the mind of the defendant that Telfer should negotiate the notes; he only proposed that he should keep them so that they should be ready in case the defendant should at

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some future time make up his mind that he had need for money which should be raised by their negotiation. For these reasons I am clearly of opinion that the decision appealed against should be affirmed.

[750] **Fletcher Moulton**, L.J.: This appeal necessarily raises more than one difficult question, and touches upon many others. The facts are simple, but they depend to some extent upon our view of the evidence; I will therefore begin by stating what upon the evidence I consider the facts to be. The defendant was leaving South Africa on business connected with mining concessions and operations in that country, and he left a power of attorney to Telfer and Wilson, and also left with them two documents which were lithographed forms of promissory notes, with nothing further written upon them than his signature. He left the notes with them as his agents for the following purpose: That they should be in their custody until either by telegram or letter he should direct them to be issued as notes for the purpose of raising funds which it might be necessary for him to have at his command in South Africa. These signed forms were actually handed to one only of the two attorneys, and this for the obvious reason that they could not be in the physical possession of both, but it was intended by the defendant, and understood by Telfer and Wilson, that they were left in their custody as being his attorneys for the above purpose. Telfer was a man of a high reputation for honesty, which he deserved but little. He came to the plaintiff and asked him whether he would purchase the defendant's two promissory notes; they were not, I think, produced at the time, but Telfer said that one was at two months, the other at three months, and that the total amount was about 500*l*. The plaintiff declined to purchase the notes unless they had two other signatures appended, and the notes were subsequently brought back to him with the words, "I promise," altered into, "We promise," and bearing the signatures of Telfer himself and of a man named Robinson. They were then bought by the plaintiff at their full value. No notice was ever given by the defendant to his attorneys that he wanted the notes negotiated, and the transaction was carried out by Telfer with a fraudulent intention. The notes were unstamped when they were made, and

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nothing was done upon them for three years, when the plaintiff came to England with them and brought this action upon them. For the purposes of this action they were stamped as foreign bills, and were properly stamped under [751] the English stamp law when the writ was issued. Under these circumstances, is the plaintiff entitled to recover?

In Cape Colony there is a stamp law closely akin to that of England, and § 18 of the Cape act is substantially the same as § 20 of the bills of exchange act 1882. But under the circumstances of the case neither of those sections is applicable; they only apply to cases where a person signs a stamped piece of paper; here the instruments were on unstamped paper. Nor do I think that the question whether the notes were stamped or not at the time of execution has any bearing upon the case, even from the point of view of an estoppel being raised against the defendant; for it seems that the Cape law, though it directs that a bill or note shall be made on paper with an impressed or adhesive stamp, does not make that condition essential to its validity, and a bill or note can in that country be stamped after its making. I think, therefore, that the absence of a stamp was not notice to the plaintiff of Telfer's want of authority. I need not further refer to the stamp question.

As § 18 of the Cape act and § 20 of the bills of exchange act do not assist us, we are thrown back on the common-law doctrine of estoppel (which was in existence long before the bills of exchange act) as applicable to the case of negotiable instruments. I will deal first with the circumstances under which the plaintiff purchased the bills, in order to see whether, under all the circumstances, it is just or equitable to say that the defendant is estopped from denying that the bills were made with his authority and that he is liable on them. In my opinion the proper conclusion to be drawn from the evidence is that the plaintiff had notice that Telfer held a power of attorney from the defendant, and also that the plaintiff was aware that Telfer was exercising powers on behalf of the defendant as to filling up the notes and making them joint notes, presumably derived from that power of attorney, and that he in fact thought Telfer was acting under the power of attorney. In other words, he had notice that Telfer was an agent who had written instructions limiting his authority, and that the

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notes were in his possession as such agent. Under the circumstances I am prepared to hold that [752] the plaintiff was bound to examine into Telfer's authority as so limited, and if he had done so he would have found that Telfer could not act alone, and then this fraud could not have been perpetrated. In such a state of facts it would not be just to hold that the defendant is estopped from denying that the notes were made by his authority.

But although upon the special circumstances of the case I am of opinion that this action must fail, I am also of opinion that the same conclusion will follow if it be considered upon the broad grounds upon which Vaughan Williams, L. J., has based his judgment, in which I entirely concur. The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument. Notice of such limitation may be given in various ways by the instrument itself. For instance, if in the country where the negotiable instrument is made, a negotiable instrument can only be made on paper bearing an impressed ad valorem stamp, the presence of a stamp on the piece of paper would be a notice of limitation of the agent's authority as to the amount of the instrument.

But, in the absence of notice appearing on the face of the instrument, so soon as there is an intention on the part of the signer that the piece of paper shall form the basis of a negotiable instrument, no limitation of the agent's authority can be allowed to affect third parties taking it without notice. But in my opinion there was no such intention here, and the action fails for that reason. I think that the defendant delivered the documents to Telfer (as representing his two attorneys) for safe custody only. No doubt both parties contemplated that the defendant might change his mind, and might direct that the documents, which physically were in the possession of the agent, might at some future time be used as the basis of two promissory notes. But that fact does not qualify the purpose for which the instruments were consigned to Telfer. They were handed to him as custodian only, and it is immaterial whether, when they were so handed, the defendant said that the [753] time might come when he might desire to change their character, or whether he

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made no remark on the subject. Both parties knew that they were delivered for safe custody only. The essential fact which is necessary to enable the plaintiff to establish his case is therefore absent. The defendant never issued the documents with the intention that they should become negotiable instruments. We were pressed with the argument that, as regards third parties, the question of the defendant's intention that Telfer should be the mere custodian of the documents or that he should have power to issue them as notes does not affect his liability, because in either view the possession of the documents enabled Telfer to put them in circulation as promissory notes. Therefore Mr. Lush, quoting *Lickbarrow* v. *Mason* (1794) 5 T. R. 683, 4 Eng. Rul. Cas. 756, says that there is an estoppel on the defendant independent of any intention that they should become promissory notes. In my opinion this argument goes much too far. If we are to measure the estoppel by the physical possibility of deception, § 20 of the bills of exchange act would contain something which would be absolutely irrelevant, and which yet is made a condition of the section being applicable. That section commences with the words, "where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill;" in other words, the intention that it shall be converted into a bill is made a condition of the operation of the section. In my opinion § 20 is based upon the doctrine of common-law estoppel as it existed at the date of the act, and therefore the presence of the condition as to its operation shows that the legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable. In other words, both the common law and the statute realized the possibility of two rival dangers—on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and [**754**] put it in circulation and thereby injure innocent persons. They therefore drew the line as regards the protection of third parties in the following very reasonable and intelligible way: If the signer

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intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no *animus emittendi,* and he would therefore not be liable for the act of a bailee who turned the document into a negotiable instrument. The present case sharply raises the question of the line of demarcation, and as I think that the signed forms were in the possession of Telfer as custodian only, and not as the defendant's agent with an intention on the defendant's part that he should issue them as promissory notes, the defendant is not estopped from saying that he was not the maker of the notes sued upon. I agree that the appeal should be dismissed.

Buckley, L.J.: I agree that this appeal fails, and I desire to make only two short observations upon two points that have arisen during the argument. First, as to the case of *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201, 61 L. J. Ch. N. S. 723, 66 L. T. N. S. 625, 41 Week. Rep. 108, 56 J. P. 644. That decision is not, I think, available for the purpose for which the appellant sought to use it. The instruments there in question were negotiable securities; the question which the court had to decide was a question between different persons claiming to be owners of them. That is not the question here; the question is whether these promissory notes were ever negotiable instruments. The decision cited is no authority upon that point. The passage which was cited from the judgment of Lord Herschell deals with negotiable instruments. He says ([1892] A. C. at p. 215): "Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them." That passage does not apply to the maker of a promissory note, for the maker [**755**] of a promissory note cannot be the owner of it as an obligation; he is the person liable upon the note, and not its owner.

The second remark which I wish to make is that this appeal fails on the ground that the promissory notes never became nego-

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tiable instruments, the reason being that the defendant never issued them, nor authorized anyone else to issue them, as negotiable instruments. The result is the same as though the defendant had said to Telfer, "I hand you this piece of paper bearing my signature; keep it as my custodian, because it may be convenient in the future to make you my agent for its issue as a promissory note." The contemplated time never arrived; Telfer never had authority to issue the documents as promissory notes, but merely held them for safe custody. The recent decision of this court in *Lloyd's Bank, Ld.* v. *Cooke* [1907] 1 K. B. 794, *ante,* 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182, has no application to the present case. There a person was intrusted with authority to fill up two promissory notes for a certain amount, and he filled them up for too large an amount. But the documents were handed to him for the purpose of issue as promissory notes, while here there has never been a negotiable instrument at all, and the authorities as to negotiable instruments have no application. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Church, Rackham & Company.*
Solicitors for defendant: *Richardson & Company.*

Note.—Liability of maker, acceptor, or indorser of commercial paper where blanks therein are filled up contrary to his instructions.

The scope of this note does not extend to cases where the terms of commercial paper have been altered after the party sought to be held liable has placed his signature thereon; or cases where the tenor of a note, ostensibly complete when it left the hands of the person sought to be charged, has been changed by the addition of further clauses without his authority; nor does it include cases where the defendant was deceived as to the character of the paper signed by him, for which reference may be made to a note in 4 B. R. C. 663, *passim.*

No attempt is made to discuss the circumstances in which the payee will be charged with notice that the blanks were wrongfully filled up, other than the effect of his knowledge that the note was incomplete when it left the hands of the party sought to be charged.

The three cases which precede this note, HERDMAN v. WHEELER,

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LLOYD'S BANK v. COOKE, and SMITH v. PROSSER, constitute an interesting series of decisions bearing upon the question under discussion. The first holds that a payee, though he may be a holder in due course, is not a holder to whom the note has been "negotiated" within the meaning of the proviso of the English bills of exchange act relating to commercial paper signed in blank and intrusted to another, that "if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given." The provisions of the English act in this respect are substantially identical with those of the Canada bills of exchange act and the negotiable instruments law in force in many of the United States. The second of these decisions, LLOYD'S BANK v. COOKE, nullifies to a considerable extent the practical effect of the decision in the first by holding that, though there may be no liability under the bills of exchange act, there remains a common-law liability growing out of the estoppel of the defendant to deny the validity of the obligation. The third decision, SMITH v. PROSSER, limits the effect of the decision in the second by holding that its principle does not extend to cases where the instrument was not put into the hands of the person who has perpetrated the fraud, with authority to issue it as commercial paper. The first and second of these decisions are of especial interest in jurisdictions where the uniform negotiable instruments law has been adopted, while the second and third are of importance equally where such enactment is not, as where it is, in force. It may also be pointed out that the authority of the decision in HERDMAN v. WHEELER, which was somewhat impugned by the comments of the various members of the court of appeal in LLOYD'S BANK v. COOKE, is fully restored by the decision of that tribunal in SMITH v. PROSSER, where a contrary conclusion might have been reached had the court thought proper to overrule HERDMAN v. WHEELER.

In jurisdictions where, as in Illinois, the words, "issued or," are interpolated before the word "negotiated" in the proviso clause of the section of the negotiable instruments law relating to the liability of any person becoming a party to an instrument prior to its completion, the question under discussion would seem to be conclusively settled in favor of a payee taking the instrument in good faith and for value, provided, however, that the instrument is then complete and regular on its face. See *Manussier* v. *Wright*, set out under catchline, "Liability under statutes," *infra*.

At common law.

It is a universally recognized rule of the law merchant, probably adopted for the purpose of avoiding the effect of the rule that an

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unauthorized alteration of commercial paper renders it invalid even in the hands of a bona fide holder, that (subject to certain limitations presently to be discussed) where a note or bill of exchange is signed, accepted, or indorsed containing blanks not so filled up as to make it a complete instrument, there is an implied authority to the holder to fill up the blanks in respects essential to the completeness of the instrument. See *Russel* v. *Langstaffe* (1780) 2 Dougl. K. B. 514; *Collis* v. *Emmett* (1790) 1 H. Bl. 313; *Cruchley* v. *Clarance* (1813) 2 Maule & S. 90, 14 Revised Rep. 96; *London & S. W. Bank* v. *Wentworth* (1880) 5 Ex. D. 96, 49 L. J. Exch. N. S. 657, 42 L. T. N. S. 188, 28 Week. Rep. 516; *Garrard* v. *Lewis* (1882) 10 Q. B. D. 30, 47 L. T. N. S. 408; *McInnes* v. *Milton* (1870) 30 U. C. Q. B. 489; *Hall* v. *Merrick* (1877) 40 U. C. Q. B. 566; *Violett* v. *Patton* (1809) 5 Cranch, 142, 3 L. ed. 61; *Bank of Pittsburgh* v. *Neal* (1860) 22 How. 96, 16 L. ed. 323; *Angle* v. *Northwestern Mut. L. Ins. Co.* (1876) 92 U. S. 330, 23 L. ed. 556; *National Exch. Bank* v. *White* (1887) 30 Fed. 412; *Huntington* v. *Branch Bank* (1841) 3 Ala. 186; *Prim* v. *Hammel* (1902) 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006; *White-Wilson-Drew Co.* v. *Egelhoff* (1910) 96 Ark. 105, 131 S. W. 208; *Ofenstein* v. *Bryan* (1902) 20 App. D. C. 1; *Roth* v. *Donnelly Grocery Co.* (1911) 8 Ga. App. 851, 70 S. E. 140; *White* v. *Alward* (1889) 35 Ill. App. 195; *Leseure* v. *Weaver* (1901) 99 Ill. App. 375; *Johns* v. *Harrison* (1863) 20 Ind. 317; *Spitler* v. *James* (1869) 32 Ind. 202, 2 Am. Rep. 334; *Gillaspie* v. *Kelley* (1872) 41 Ind. 158, 13 Am. Rep. 318; *Wilson* v. *Kinsey* (1874) 49 Ind. 35; *Coburn* v. *Webb* (1877) 56 Ind. 96, 26 Am. Rep. 15; *Gothrupt* v. *Williamson* (1878) 61 Ind. 599; *Geddes* v. *Blackmore* (1892) 132 Ind. 551, 32 N. E. 567; *Joseph* v. *First Nat. Bank* (1876) 17 Kan. 256; *Bank of Limestone* v. *Penick* (1827) 5 T. B. Mon. 25; *Bank of Commonwealth* v. *Curry* (1834) 2 Dana, 142; *Bank of Commonwealth* v. *McChord* (1836) 4 Dana, 191, 29 Am. Dec. 398; *Hall* v. *Bank of Commonwealth* (1837) 5 Dana, 258, 30 Am. Dec. 685; *Jones* v. *Shelbyville F. Life & M. Ins. Co.* (1858) 1 Met. (Ky.) 58; *Smith* v. *Lockridge* (1871) 8 Bush, 423; *Woolfolk* v. *Bank of America* (1874) 10 Bush, 504; *Cason* v. *Grant County Deposit Bank* (1895) 97 Ky. 487, 53 Am. St. Rep. 418, 31 S. W. 40; *Hermann* v. *Gregory* (1909) 131 Ky. 819, 115 S. W. 809; *Sowders* v. *Citizens' Nat. Bank* (1890) 12 Ky. L. Rep. 356; *Abbott* v. *Rose* (1873) 62 Me. 194, 16 Am. Rep. 427; *Market & F. Nat. Bank* v. *Sargent* (1893) 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192; *Ives* v. *Farmers' Bank* (1861) 2 Allen, 236; *Whitmore* v. *Nickerson* (1878) 125 Mass. 496, 28 Am. Rep. 257; *Johnson* v. *Blasdale* (1843) 1 Smedes & M. 17, 40 Am. Dec. 85; *Hemphill* v. *Bank of Alabama* (1846) 6 Smedes & M. 44; *Goad* v. *Hart* (1847) 8 Smedes & M. 787; *Davis* v. *Lee* (1853) 26 Miss. 505, 59 Am. Dec. 267; *Schooler* v. *Tilden* (1880) 71 Mo. 580; *National Bank* v. *Nickell*

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(1888) 34 Mo. App. 295; *Mackey* v. *Basil* (1892) 50 Mo. App. 190; *Bank of Houston* v. *Day* (1909) 145 Mo. App. 410, 122 S. W. 756; *Redlich* v. *Doll* (1873) 54 N. Y. 235, 13 Am. Rep. 573; *McGrath* v. *Clark* (1874) 56 N. Y. 34, 15 Am. Rep. 372; *Weyerhauser* v. *Dun* (1885) 100 N. Y. 150, 2 N. E. 274; *Mitchell* v. *Culver* (1827) 7 Cow. 336; *Smith* v. *Wyckoff* (1845) 3 Sandf. Ch. 77; *Hardy* v. *Norton* (1873) 66 Barb. 527; *Harris* v. *Berger* (1888) 15 N. Y. S. R. 389; *Linick* v. *A. J. Nutting & Co.* (1910) 140 App. Div. 265, 125 N. Y. Supp. 93; *Porter* v. *Hardy* (1901) 10 N. D. 551, 88 N. W. 458; *Worrall* v. *Gheen* (1861) 39 Pa. 388; *Simpson* v. *Bovard* (1873) 74 Pa. 351; *Carson* v. *Hill* (1840) 1 McMull. L. 76; *Waldron* v. *Young* (1872) 9 Heisk. 777; *Frazier* v. *Gains* (1872) 2 Baxt. 92; *Jones* v. *Primm* (1851) 6 Tex. 170; *Michigan Ins. Co.* v. *Leavenworth* (1856) 30 Vt. 11; *Douglass* v. *Scott* (1837) 8 Leigh, 43; *Jordan* v. *Neilson* (1795) 2 Wash. (Va.) 164; *Orrick* v. *Colston* (1850) 7 Gratt. 189; *Frank* v. *Lilienfeld* (1880) 33 Gratt. 377; *Snyder* v. *Van Doren* (1879) 46 Wis. 602, 32 Am. Rep. 739, 1 N. W. 285.

But a drawee cannot fill up a blank bill and hold the drawers and indorsers, without any other authority than such as is implied in the fact that the bill was sent him by the last indorser with the consent of the other indorser and of the drawers. *Davidson* v. *Lanier* (1866) 4 Wall. 447, 18 L. ed. 377.

The implied agency of the person to whom the note or bill signed in blank is delivered is of the most general and absolute nature, and he may bind the signer to any extent so long as he does not change the nature of the instrument indicated by the blank so signed, or erase or change the parts of the instrument which were written or printed at the time of such signing. (*Snyder* v. *Van Doren* (1879) 46 Wis. 602, 32 Am. Rep. 739, 1 N. W. 285.) He may not make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same as shown by its written or printed terms. (*Angle* v. *Northwestern Mut. L. Ins. Co.* (1876) 92 U. S. 330, 23 L. ed. 556.) For example, a blank form of promissory note cannot be converted into a guaranty so as to hold the signer liable as guarantor. *Hall* v. *Merrick* (1877) 40 U. C. Q. B. 566.

It is immaterial to the parties to the note whether the blank is filled in by the first holder or his transferee, as until the blank is filled each successive holder takes the note with authority to fill the blank according to the implied intent of the parties. *Page* v. *Morrel* (1866) 3 Abb. App. Dec. 433.

Any agreement between the surety on a note and the maker as to how a blank shall be filled in will not affect or control the right of a holder without notice thereof to fill the blank. *Johns* v. *Harrison* (1863) 20 Ind. 317.

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In jurisdictions where a bill or note is required to be on stamped paper, the holder has implied authority to fill it up with any amount which the stamp will warrant; while in jurisdictions where no stamp is required, or where an adhesive stamp may be subsequently affixed at any time, a bill or note the amount of which has been left blank amounts to a letter of credit for an indefinite sum. Thus in *Brahan* v. *Ragland* (1830) 3 Stew. (Ala.) 247, it was said that it is a rule of the English law merchant that he who writes his name on a blank paper stamped for a bill or note gives an implied authority to the holder of it to fill it up with any amount that the stamp will warrant; and in states where promissory notes are not required to be made on stamped paper, it would seem by analogy that the person signing continues liable without limitation as to amount in favor of a bona fide holder for a valuable consideration.

A memorandum of the amount in the margin of the note has been held to operate as a limitation upon the implied authority of the holder to fill up the blank (*Norwich Bank* v. *Hyde* (1839) 13 Conn. 279; *Woolfolk* v. *Bank of America* (1874) 10 Bush, 504; *Schryver* v. *Hawkes* (1872) 22 Ohio St. 308); but in *Garrard* v. *Lewis* (1882) 10 Q. B. D. 30, it was said by Bowen, L. J.: "Is the apparent and ostensible authority of the drawer to whom the acceptance was intrusted in blank necessarily limited by the figure in the margin when the holder of the bill is acting innocently and in good faith? I think not. For it is conceivable that, after the bill was signed in its original form, the acceptor may have changed his mind, and authorized the drawer to disregard the index and to fill in the body of the bill with a larger amount. If the acceptor had in fact authorized this to be done, surely he could not, as against a subsequent holder, deny that the bill for the larger amount inserted by his express direction was his bill simply because the marginal figure had been left unchanged."

Where the maker changes the figures written in the margin of the note and fills up the blank with an amount corresponding to the alteration, the surety is not discharged from liability to one who takes the note in good faith, such figures being no part of the note so as to render their alteration a forgery, and it being the business of a principal to give notice to parties dealing with his agent of the fact of private instructions or limitations upon his authority, so that if he adopts means to that end which prove ineffectual through the fault of his agent, he, and not the other party who has dealt with the agent in good faith, must suffer the loss. *Schryver* v. *Hawkes* (1872) 22 Ohio St. 308; and see also to the same effect, *Johnston Harvester Co.* v. *McLean* (1883) 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; and *Garrard* v. *Lewis, supra.*

Where the rate of interest is left blank, the implied authority of the holder to fill in the blank is limited to the legal rate. *Fisher* v.

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Dennis (1856) 6 Cal. 577, 65 Am. Dec. 534; *National Bank* v. *Nickell* (1888) 34 Mo. App. 295; *Selser* v. *Brook* (1854) 3 Ohio St. 302.

The date of a note is no exception to the rule that the holder has implied authority to fill blanks, since, although it is not essential to the validity of a note that the date be expressed, it is essential to the free and uninterrupted negotiability of a note that it should be dated; therefore all the parties to a note intended for circulation are presumed to consent that a person to whom such a note is intrusted for the purpose of raising money may fill up the blank with a date. (*Page* v. *Morrel* (1866) 3 Abb. App. Dec. 433; *Mitchell* v. *Culver* (1827) 7 Cow. 336.) But as between the original parties to the instrument or a subsequent holder with notice, the original payee or such subsequent holder with notice has implied authority by virtue of the blank contained in the note, only to fill in the true date, or such a date as was directed or contemplated by the parties. (*Bank of Houston* v. *Day* (1909) 145 Mo. App. 410, 122 S. W. 756.) A blank left for the day of the month may be filled in with any day in that month, there being no authority or express direction to the contrary. (*Page* v. *Morrel, supra.*)

Where a party writes his own name on a piece of blank paper and delivers it to another person with intent that such other person may use his name as the drawer of a bill of exchange or maker of a promissory note, or where his name is so written as to indicate that the writer is to be the indorser of a promissory note or the acceptor of a bill of exchange, and with the understanding that a promissory note or bill of exchange may be written on such blank paper, or where he signs or indorses a note or bill of exchange in blank, either written or printed but not so filled up as to make it a perfect note or bill at the time it is so signed, a bona fide holder for value, whether a payee or subsequent indorsee, may recover on the same; and in such case it is no defense that the party to whom the instrument was delivered in blank exceeded his actual authority. For cases in which such a person has been held liable to the payee, see *Gothrupt* v. *Williamson* (1878) 61 Ind. 599; *Roberson* v. *Blevins* (1896) 57 Kan. 50, 45 Pac. 63; *Torrey* v. *Fisk* (1848) 10 Smedes & M. 590; *Harris* v. *Enyart* (1850) 13 Mo. 108; *Humphreys* v. *Finch* (1887) 97 N. C. 303, 1 S. E. 870; *Fullerton* v. *Sturges* (1855) 4 Ohio St. 529; *Simpson* v. *Bovard* (1873) 74 Pa. 351; *Diercks* v. *Roberts* (1879) 13 S. C. 338; *Nichol* v. *Bate* (1837) 10 Yerg. 429; *Waldron* v. *Young* (1872) 9 Heisk. 777; *Frazier* v. *Gains* (1872) 2 Baxt. 92; *Frank* v. *Lilienfeld* (1880) 33 Gratt. 377; *Johnston Harvester Co.* v. *McLean* (1883) 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; and see *dictum* in *Roberts* v. *Adams* (1838) 8 Port. (Ala.) 297, 33 Am. Dec. 291. For cases in which such a person has been held liable to a subsequent holder in good faith, see *Barker* v. *Sterne* (1854) 9 Exch. 684, 2 C. L. R. 1020, 23 L. J. Exch. N. S. 201, 2 Week. Rep. 418; *Mc-*

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Innes v. *Milton* (1870) 30 U. C. Q. B. 489; *Bank of Nova Scotia* v. *Lepage* (1889) Montreal L. R. 6 S. C. 321; *Bank of Pittsburgh* v. *Neal* (1860) 22 How. 96, 16 L. ed. 323; *Herbert* v. *Huie* (1840) 1 Ala. 18, 34 Am. Dec. 755; *Huntington* v. *Branch Bank* (1841) 3 Ala. 186; *Decatur Bank* v. *Spence* (1846) 9 Ala. 800; *Robertson* v. *Smith* (1850) 18 Ala. 220; *Prim* v. *Hammel* (1902) 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006; *White-Wilson-Drew Co.* v. *Egelhoff* (1910) 96 Ark. 105, 131 S. W. 208; *Fisher* v. *Dennis* (1856) 6 Cal. 577, 65 Am. Dec. 534; *Statton* v. *Stone* (1900) 15 Colo. App. 237, 61 Pac. 481; *Moody* v. *Threlkeld* (1853) 13 Ga. 55; *Wilkes* v. *Pope* (1908) 4 Ga. App. 36, 60 S. E. 823; *Young* v. *Ward* (1859) 21 Ill. 223; *Elliott* v. *Levings* (1870) 54 Ill. 213; *Merritt* v. *Boyden* (1901) 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907, affirming 93 Ill. App. 613; *Spitler* v. *James* (1869) 32 Ind. 202, 2 Am. Rep. 334; *Gillaspie* v. *Kelley* (1872) 41 Ind. 158, 13 Am. Rep. 318; *Iowa College* v. *Hill* (1861) 12 Iowa, 462; *Rainbolt* v. *Eddy* (1872) 34 Iowa, 440, 11 Am. Rep. 152; *Frank* v. *Hollands* (1890) 81 Iowa, 164, 46 N. W. 979; *Joseph* v. *First Nat. Bank* (1876) 17 Kan. 256; *Lowden* v. *Schoharie County Nat. Bank* (1888) 38 Kan. 533, 16 Pac. 748; *Bank of Commonwealth* v. *Curry* (1834) 2 Dana, 142; *Smith* v. *Lockridge* (1871) 8 Bush, 423; *Woolfolk* v. *Bank of America* (1874) 10 Bush, 504; *Battalora* v. *Erath* (1873) 25 La. Ann. 318; *Abbott* v. *Rose* (1873) 62 Me. 194, 16 Am. Rep. 427; *Market & F. Nat. Bank* v. *Sargent* (1893) 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192; *Putnam* v. *Sullivan* (1808) 4 Mass. 45, 3 Am. Dec. 206; *Weidman* v. *Symes* (1899) 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894; *Cedar Rapids Nat. Bank* v. *Mottle* (1911) 115 Minn. 414, 132 N. W. 911; *Fanning* v. *Farmers' & M. Bank* (1847) 8 Smedes & M. 139; *Davis* v. *Lee* (1853) 26 Miss. 505, 59 Am. Dec. 267; *Goss* v. *Whitehead* (1857) 33 Miss. 213; *Tumilty* v. *Bank of Missouri* (1850) 13 Mo. 276; *Farmers' Bank* v. *Garten* (1863) 34 Mo. 119; *Green* v. *Kennedy* (1879) 6 Mo. App. 577; *Bank of Houston* v. *Day* (1909) 145 Mo. App. 410, 122 S. W. 756; *Humphrey Hardware Co.* v. *Herrick* (1904) 72 Neb. 878, 101 N. W. 1016, 102 N. W. 1010; *Van Duzer* v. *Howe* (1860) 21 N. Y. 531; *Redlich* v. *Doll* (1873) 54 N. Y. 235, 13 Am. Rep. 573; *Griggs* v. *Howe* (1860) 31 Barb. 100, affirmed in 2 Abb. App. Dec. 291; *Harris* v. *Berger* (1888) 15 N. Y. S. R. 389; *McArthur* v. *McLeod* (1859) 51 N. C. (6 Jones, L.) 475; *Porter* v. *Hardy* (1901) 10 N. D. 551, 88 N. W. 458; *Bank of St. Clairsville* v. *Smith* (1831) 5 Ohio, 222; *Gillespie* v. *Rogers* (1818) 184 Pa. 488, 39 Atl. 290; *Snyder* v. *Armstrong* (1873) 9 Phila. 146; *Abram* v. *Greer* (1913) — R. I. —, 88 Atl. 884; *Witte* v. *Williams* (1876) 8 S. C. 290, 28 Am. Rep. 294; *Grissom* v. *Fite* (1858) 1 Head, 332.

The application of the foregoing rule is not affected by the non-

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negotiable character of the note. *Frazier* v. *Gains* (1872) 2 Baxt. 92; *Johnston Harvester Co.* v. *McLean* (1883) 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177.

The rule is applicable where a blank note signed by one maker for accommodation is so filled out as to make it the joint and several note of the person first signing and others subsequently joining therein. *Snyder* v. *Van Doren* (1879) 46 Wis. 602, 32 Am. Rep. 739, 1 N. W. 285; and see also *Jones* v. *Shelbyville F. Life & M. Ins. Co.* (1858) 1 Met. (Ky.) 58, where it was held that a party signing a blank paper on which a note is to be drawn, and intrusting it to another, thereby confers an implied authority upon the latter to fill it up at his discretion, not only with the amount, date, and time of payment, but with the names of any additional obligors or other parties; and the party signing the blank instrument will be bound by it when completed in the hands of the holder, whatever may have been his agreement with the person so trusted, and to whatever extent the latter may have violated the agreement or have exceeded his implied authority, provided the holder had no notice either of the agreement or of its breach.

The rule by which a recovery in such a case is allowed does not rest upon the implication of authority to fill up a blank note signed and delivered to another for the purpose of being filled out, but on the much broader ground that where one of two innocent persons must sustain a loss, he must bear it who is most in fault. *Herbert* v. *Huie* (1840) 1 Ala. 18, 34 Am. Dec. 755. So, also, in *Redlich* v. *Doll* (1873) 54 N. Y. 235, 13 Am. Rep. 573, it is said that the liability of the maker in such a case has also sometimes been placed upon the principle of estoppel, he having put his paper in circulation and thus invited the public to receive it of anyone having apparent title, being estopped to urge the actual defect of title against a bona fide holder. In *Fullerton* v. *Sturges* (1855) 4 Ohio St. 529, it was said: "No rule is better settled, or founded upon stronger reasons, than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given has been exceeded, or the confidence reposed has been abused. It has the effect of a general letter credit; and the rule is founded, not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agency, which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as possessing a more enlarged authority."

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— knowledge that instrument was signed in blank as affecting taker's bona fides.

Inasmuch as the holder has implied authority to fill the blanks in the instrument, the fact that the person taking it is aware that the instrument contained blanks when executed is held not to impose upon him the duty of inquiry as to the extent of the holder's actual authority, so as to affect his bona fides. See *White-Wilson-Drew Co.* v. *Egelhoff* (1910) 96 Ark. 105, 131 S. W. 208; *Grissom* v. *Fite* (1858) 1 Head, 332; *Frank* v. *Lilienfeld* (1880) 33 Gratt. 377; *Snyder* v. *Van Doren, supra.* In *Huntington* v. *Branch Bank* (1841) 3 Ala. 186, the court said: "The supposition that the knowledge of the fact that the note is not filled up should put anyone taking the note on inquiry as to the authority of the agent assumes as true the proposition to be established. It by no means follows that the possessor of a blank signature holds it under an agreement to fill it up for a particular amount, or dispose of it in a particular mode; a much more natural presumption is, that he is vested with a discretion in relation to it, and that, in the language of Lord Mansfield, in *Russel* v. *Langstaffe,* cited from Douglass—'it is a letter of credit for an indefinite sum.' As, therefore, the transaction may be what the holder of the bank represents it to be, or at least, as there is nothing in the mere possession of a blank note which would lead to a suspicion of unfairness or fraud, with no propriety whatever could an innocent purchaser be so affected with notice of the transaction as to put him on inquiry of the maker."

Accordingly, it has been held immaterial that the blanks are filled in in the presence of the person who advances money thereon (*Chemung Canal Bank* v. *Bradner* (1861) 44 N. Y. 680); and that the fact that the maker of a note fills it up in the presence of the payee does not create a presumption that he is exceeding the authority conferred upon him by the surety whose name appears thereon. (*Simpson* v. *Bovard* (1873) 74 Pa. 351.) One whose name is inserted in a note as payee is not chargeable with notice of a limitation upon the maker's authority to fill in the blank so as to charge an indorser by the fact that the space for the name was left blank. *Wilson* v. *Kinsey* (1874) 49 Ind. 35.

Having executed a note in blank as to the amount, with the intention that the blank shall be filled before being negotiated by the person in whose possession it was placed after signature, third persons dealing with the person in possession have the right to presume that the authority to fill the blank was a general and not a special authority, and they are not bound by any private instructions as to the amount to be inserted in the note. *Johnston Harvester Co.* v. *McLean* (1883) 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177.

But the fact that the note is known to have been in the maker's

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possession for more than a year should put the taker upon inquiry as to his authority to bind the person whose name appears as an indorser thereon. *Snyder* v. *Armstrong* (1873) 9 Phila. 146.

Where person seeking to enforce note had notice of limitation of authority.

When the extent of the authority given to a person to whom a note is intrusted to fill up blanks therein is limited, then such authority must be strictly pursued, and if such authority has been exceeded, it will be available as a defense against the parties to such agreement, and against those having notice thereof, or those who in law are not innocent holders thereof. *White-Wilson-Drew Co.* v. *Egelhoff* (1910) 96 Ark. 105, 131 S. W. 208.

So, if the note be taken with the knowledge that it has been filled in in violation of the limitation imposed by the person sought to be held liable thereon, the holder will be in no better situation than the person to whom it was intrusted. *Frazier* v. *Gains* (1872) 2 Baxt. 92.

And one who is not a holder in due course cannot recover on a note the maker of which establishes by uncontradicted evidence that when he signed the instrument he signed it in blank, and that he did not authorize anyone to fill it out. *Equitable Trust Co.* v. *Lyons* (1911) 72 Misc. 49, 129 N. Y. Supp. 79.

One who takes a note with knowledge of a violation of the understanding and condition upon which it was signed and delivered cannot enforce it against an accommodation indorser. *Wagner* v. *Diedrich* (1872) 50 Mo. 484.

Where the agent of the payee has knowledge of the sum for which one signing a blank note as surety intends to bind himself, the payee cannot afterward enlarge the liability of such surety by filling up the blank for a larger amount without his assent. *Robertson* v. *Glasscock* (1851) 6 La. Ann. 124.

— extent of recovery.

According to some cases, if an agent in filling up a blank note exceeds his authority, and a third person receives the note with the knowledge that the authority was limited and has been transcended, the note will not be void *in toto,* but only for the excess beyond the sum authorized, upon the ground that the act of an agent who exceeds his authority is binding upon the principal to the extent to which it was authorized. *Clower* v. *Wynn* (1877) 59 Ga. 246; *Johnson* v. *Blasdale* (1843) 1 Smedes & M. 17, 14 Am. Dec. 85; *Hemphill* v. *Bank of Alabama* (1846) 6 Smedes & M. 44; *Goad* v. *Hart* (1847) 8 Smedes & M. 787; *Goss* v. *Whitehead* (1857) 33 Miss. 213. But in *Ogden* v. *Pope* (1892) 44 N. Y. S. R. 646, 18 N. Y. Supp. 140,

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it was held that inasmuch as it is forgery to insert in a note an amount in excess of that authorized, one who does so cannot recover thereon even for the amount actually authorized. And in *Mackey* v. *Basil* (1892) 50 Mo. App. 190, it was held that any departure from the agreement as to the manner in which blanks are to be filled will defeat the right of the original holder to recover upon the instrument.

Liability under statutes.

A bank to whom a note, the amount of which was left blank, has been delivered, and by whose cashier the amount was filled in, is not a holder in due course within the provisions of the Illinois negotiable instruments law, defining a holder in due course as a holder who has taken the instrument under the condition that the instrument is complete and regular upon its face, and therefore cannot, in view of § 14 of that act, which provides that in order that an incomplete instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled in strictly in accordance with the authority given and within a reasonable time, and that if any such instrument after completion is issued or negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and may be enforced by him as if it had been filled up strictly in accordance with the authority given and within a reasonable time,—recover against a maker who has authorized the filling in of the blank for a less sum. *Manussier* v. *Wright* (1910) 158 Ill. App. 214.

In *VanderPloeg* v. *Van Zuuk* (1907) 135 Iowa, 350, 13 L.R.A. (N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 809, it was held that a payee who takes a note for past indebtedness in which a blank has been wrongfully filled out, is not a holder in due course within the meaning of the section in the negotiable instruments law requiring blanks to be filled according to instructions, but providing that if such an instrument after completion is negotiated to a holder in due course, he may enforce it as if it had been filled up strictly in accordance with the authority given.

In *Boston Steel & I. Co.* v. *Steuer* (1903) 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646, a case decided under the negotiable instruments act, it was held that the rights of the payee of a check the amount of which was left blank depended upon the authority actually given by the drawer.

Under the provisions of the negotiable instruments law relating to the filling of blanks that "in order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time," a bank which takes a note perfect on its face with the ex-

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ception of a blank for the name of the payee, and inserts its own name as payee, cannot recover against one who had signed it under an agreement with his comaker, who sold it to the bank, that it should be used by him in buying certain property, that the name of the seller should be inserted in the blank, and that the note should be returned if not used for that purpose. *Hartington Nat. Bank* v. *Breslin* (1910) 88 Neb. 47, 31 L.R.A.(N.S.) 130, 128 N. W. 659, Ann. Cas. 1912B, 1008.

One to whom a check, blank as to amount, has been delivered in payment for goods purchased, has no authority to fill it out for an amount to which the drawer is indebted to him upon open account. *Rodgers* v. *Baker* (1910) 136 App. Div. 851, 122 N. Y. Supp. 91.

Under the provision of the negotiable instruments law that delivery operates as prima facie authority to fill up the blanks of an incomplete instrument, it is incumbent upon a person seeking to recover thereon to prove authority to fill up the blanks; but under the provision of such act that "in order that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time," the burden is upon the plaintiff to prove that the blanks were filled up within a reasonable time. *Madden* v. *Gaston* (1910) 137 App. Div. 294, 121 N. Y. Supp. 951.

The authority of LLOYD'S BANK v. COOKE is recognized in *Lilly* v. *Farrar* (1908) Rap. Jud. Quebec, 17 B. R. 554, a case arising under the Canada bills of exchange act, where the court said that had the evidence been sufficient to show that the maker's instructions had been violated, they would have held that as against one whose name is fraudulently inserted as payee in a note by one to whom it had been intrusted by the maker for another purpose, the latter is estopped to assert that the act of such person was without authority.

According to the construction put upon the Canada bills of exchange act in one case, one who takes a note knowing it to have been signed in blank can no longer rest on the presumption that the authority of the person to whom it was intrusted was sufficient to warrant the filling of the blanks in the manner in which they are filled, but is bound to ascertain the limitations of such person's authority. In *Demers* v. *Laveille* (1913) 11 D. L. R. 22, it was held that in order to be entitled to recover under the provision of the Canada bills of exchange act, that in order that an instrument executed in blank "when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given; provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it

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had been filled up within a reasonable time, and strictly in accordance with the authority given,"—one who had knowledge that the note was one which had been delivered in blank must show that the note was filled up within a reasonable time, and that it was filled up strictly in accordance with the authority given.

In *Fraser* v. *Ekstrom* (1899) 6 Terr. L. R. 464, it was held that under the provisions of the Canada bills of exchange act the indorsee of an overdue note can recover only for the amount which should have been inserted.

Where the bill or note is not meant to be issued—doctrine of SMITH v. PROSSER.

The distinction taken in SMITH v. PROSSER between cases where a blank negotiable instrument is intrusted to another for the purpose of being issued as such, and cases where such an instrument is simply put into his hands as custodian without authority to issue it, appears to be a valid one, although it may seem at first that as the physical possibility or deception is in both cases the same, the maxim that where one of two innocent parties must suffer, he who by his negligent conduct has made the loss possible must bear it, would equally apply. But as negligence is essentially a breach of duty, it is necessary to the application of the maxim that some duty be owed on the part of the signer of the blank instrument to the party into whose hands it may come. While there may be a duty on the part of one who delegates the performance of an act to another to see to it that in performing such act the latter does not exceed his authority, it may properly be said that no such duty can exist where the latter is not empowered to act at all. In other words, the operation of the maxim above referred to is properly to be limited to cases in which the act which causes the loss has the assent of the actor. The question whether the operation of this maxim may be so limited has arisen in this series in another connection. See 4 B. R. C. at page 691.

In *Hubbert* v. *Home Bank* (1910) 20 Ont. L. Rep. 651, where it appeared that one who had been induced to make an application for insurance upon his life delivered to the insurance agent a blank form signed and indorsed by him as follows:

"$440.50 Oct. 1st, 1908.
December 1st. After date I promise to pay to the order of myself dollars
at
value received."

—upon the understanding and condition that nothing was to be

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done with it until and unless the applicant passed the requisite medical examination, when the paper so signed, as representing the first premium upon the life insurance, would be taken up, it was held, upon the authority of SMITH v. PROSSER, that as the paper was not delivered in order that it might be converted into a note or negotiated as a note, the signer was not liable to a bona fide holder under the Canada bills of exchange act, and was not estopped from denying the agent's authority to fill out the blank and put it in circulation.

The doctrine of SMITH v. PROSSER is extended to a case where the authority of the person to whom the note was intrusted to issue it as such, though given contemporaneously with its delivery, was conditional, in *Ray* v. *Willson* (1911) 45 Can. S. C. 401, which affirmed 24 Ont. L. Rep. 122. In that case it appeared that the owner of certain houses, anticipating the necessity of repairs thereon, sent to his agent some blank promissory note forms bearing his signature, with instructions to fill up the blanks and issue them as completed notes if, when the repairs were made, he should not have money sufficient on hand to pay for them. The agent fraudulently filled out the note in suit and used it for his own purposes. The supreme court, although divided in opinion among themselves as to whether they would, upon the evidence, have reached the same conclusion, held that they were not warranted in rejecting the finding of the trial judge, confirmed by the provincial court of appeal, that the defendant never intended nor authorized the paper sued on to be filled up as a promissory note, and that the circumstances never arose upon which only the agent was authorized to fill the same up; that the case was accordingly governed by SMITH v. PROSSER; and therefore that the defendant was not liable to a holder in due course either under the provisions of the Canada bills of exchange act, the protection afforded by that act being limited to cases where the signer intended the instrument signed by him to become a bill or note and authorized its issue for that purpose, or on the ground of estoppel, for the reasons given in SMITH v. PROSSER.

The drawer of a blank check, who intrusted it to one upon the latter's promise to deposit money to meet it, is liable to one whose name is inserted as payee, and *a fortiori* to his indorser, the promise of the person to whom the check was intrusted to take care of it on its presentation not operating as a condition upon his authority to fill it up so as to bring the case within the doctrine of SMITH v. PROSSER. *Bacon* v. *Décarie* (1908) Rap. Jud. Quebec 34 S. C. 103.

In several instances, however, the limitation put upon the operation of the principle of estoppel, in SMITH v. PROSSER, has not been recognized.

Thus, in *Redlich* v. *Doll* (1873) 54 N. Y. 235, 13 Am. Rep. 573, where the defendant had given a note, payable to his own order and

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made negotiable by his indorsement, with the understanding that it should stand merely as a memorandum of his undertaking to collect certain drafts, it was contended that as the note was delivered not to be used or filled up in any way, the rule that if a note is used or a blank therein filled up contrary to the agreement or intention of the original parties, the maker is held to any bona fide holder for value, shall not apply, but the court declined to accede to this contention, saying: "I can perceive no difference founded upon any principle. In the one case the note is delivered to be used or filled up in a particular way, and it is used or filled up in an entirely different way. In the other case, the note is made and delivered not to be used in any way. In each case there is the same wrong to the maker, the same misplaced confidence, and the same breach of trust. In either case, justice as well as the public policy, which lies at the foundation of the laws as to commercial paper, requires that the loss shall fall upon the maker rather than on the innocent holder."

And in *Ives* v. *Farmers' Bank* (1861) 2 Allen, 236, it was held that an instrument which had been filled out and put into circulation as a negotiable note by the person to whom it had been intrusted might be enforced as such by an indorsee in good faith, though intended by the party signing to be a mere memorandum.

In *Robertson* v. *Smith* (1850) 18 Ala. 220, it appeared that a note with the date and time of payment, and probably the name of the payee, in blank, had been indorsed by the defendant for the accommodation of the maker, by whom it was delivered to a third party to be discounted. The note was not discounted and therefore was retained by the third party, who, however, did not claim it or look upon it as creating any obligation on the part of the maker or indorsers. The third party afterward failed and left the state, and a creditor applied to the third party's clerk for indemnity. The clerk took the note, filled up the blanks, and passed the note to the creditor as a security for the debt due him, but told him at the time that he did not know whether anything was due to his employer on the note or not, and that he must inquire of the parties to the note. It was shown that the clerk had no authority from his employer to transfer the note unless such authority could be implied from the fact that he was settling up the employer's affairs. The creditor having indorsed the note to one claiming to be a bona fide holder for a valuable consideration without notice, it was held that notwithstanding the fact that no confidence had been placed in the clerk by the parties to the note, nor authority given him to fill it out and put it in circulation, upon the broad principle that if one signs his name to a blank bill or note intending that it shall be filled up for a particular purpose and thereby become a valid security, and parts with its possession, and it gets into market and finally into the hands of a bona fide holder for a valuable consideration without notice, the maker must

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be held to its payment without regard to the person who filled up the blanks, upon the broad principle that when one of two innocent persons must suffer, he who is most in fault must bear the loss.

E. S. O.

[ENGLISH COURT OF APPEAL.]

BATER *v.* BATER, Otherwise Lowe.

L. R. [1906] Prob. 209.
Also Reported in 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408.

International law — Divorce — Judgment in rem — Foreign court — Domicil — Jurisdiction — American law — Residence — English marriage — Decree of divorce by New York court — Validity of divorce in England.

A divorce granted by a foreign court, being a judgment affecting the status of the parties, stands on the same footing as a judgment *in rem*, and therefore cannot be set aside in this country, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced.

Castrique v. *Behrens* (1861) 30 L. J. Q. B. N. S. 163, 7 Jur. N. S. 1028, 4 L. T. N. S. 52, approved.

The domicil for the time being of the married pair, when the question of divorce arises, affords the only true test of jurisdiction to dissolve their marriage; and the court of the bona fide existing domicil has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country; and such a divorce will be recognized by the English courts even if granted for a cause which would not have been sufficient to obtain a divorce in England.

Harvey v. *Farnie* (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703, and *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 11 Reports, 527, 72 L. T. N. S. 873, applied.

The resolution of the judges in *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, must be treated as confined to the particular facts of the case in which it was given.

In 1880 a marriage was celebrated in England between two English persons. In 1886 the husband commenced divorce proceedings against the wife for adultery with B., which failed upon proof of the husband's cruelty, and in 1889 he sailed for New York, where he lived in adultery with another woman and acquired a domicil in the state of New York. The wife and B. continued to live in adultery, and in 1890 the wife went to New York for the purpose of obtaining a divorce, and subsequently obtained a decree from the New York court for dissolution of her mar-

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riage on the ground of her husband's adultery. There was no collusion between the husband and wife, but her matrimonial misconduct in England was not disclosed to the New York court. In 1893 the wife went through a ceremony of marriage with B. in New York, which, assuming they were then at liberty to marry, was a valid ceremony. In 1903 B. presented a petition for a declaration of nullity of the New York marriage:—

Held that, both according to the law of the state of New York and of England, the New York court had jurisdiction to decree a divorce, as the husband had acquired a domicil in New York, the adultery complained of by the wife was committed in that state, and the wife had elected to make the domicil of the husband her own for the purpose of the divorce proceedings, and had acquired a "residence" there [210] according to the law of New York, and consequently that the petition must be dismissed.

Decision of the President (Sir Gorell Barnes) affirmed.

(March 30, 1906.)

THIS was an appeal from a decision of the President which raised the question as to the jurisdiction of the New York court to dissolve a marriage solemnized in England between two English persons.

The facts as found by the court were as follows:

In November, 1880, Catherine Lowe, formerly Wilkinson, married Francis William Lowe, at the parish church, West Derby, Lancashire. At this time both parties were English and domiciled in England.

In 1886 Francis William Lowe instituted divorce proceedings against his wife, charging her with adultery with Thomas Bater, the present petitioner. The wife presented a cross petition charging her husband with cruelty. At the trial of the suits, in June, 1886, both petitions were dismissed, the respondent and corespondent having been found guilty of adultery, and the petitioner of cruelty. F. W. Lowe thereupon sailed for New York and lived in that state in adultery with a woman named Chamberlain, and he acquired a domicil in the state of New York. The respondent and corespondent were meanwhile living together in Liverpool, but she, becoming dissatisfied with her position, and desiring, if possible, to be married to the corespondent, arranged with him that she should go over and institute divorce proceedings in New York, notwithstanding what had already taken place in this country. Accordingly she went to

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New York, with money provided by the corespondent, with the idea that if she were successful in her suit she would return to this country and marry the corespondent,—that is, the present petitioner,—but if she failed she intended to remain in America and endeavor to earn her own living. She had no difficulty in establishing her husband's adultery to the satisfaction of the New York courts, and on May 14, 1890, she obtained a decree for dissolution of her marriage upon that ground, her husband having been previously duly served, but having taken no part in the proceedings. The divorce proceedings in this country were not disclosed to the New York courts, and it was stated that had they been [211] disclosed, Mrs. Lowe, according to the New York Code of Civil Procedure, would not have obtained relief, as she herself had been guilty of adultery. On her return to this country a case was laid before counsel as to whether she and the present petitioner could marry. He advised that it was not safe to do so, and, acting on this advice, Thomas Bater and Mrs. Lowe resolved not to run the risk of a marriage in this country, but to get married in New York. There, accordingly, on December 26, 1893, they went through a ceremony of marriage, which, assuming they were at liberty to marry, was a valid ceremony. They lived together for six months, and after that they associated together for six months. Then they separated; and in August, 1903,—ten years after the marriage ceremony,—the petitioner commenced this suit claiming a declaration that the marriage solemnized between himself and Catherine Bater, otherwise Lowe, née Wilkinson, at New York city on December 26, 1893, was null and void on the ground that her husband, Francis William Lowe, was still alive.

The question before the court to a great extent depended upon the proper construction to be placed on several sections of the Code of Civil Procedure of the state of New York (hereinafter referred to as the "New York Code") applicable to this particular case, and on this point the evidence of several American lawyers, who were called as witnesses, was conflicting. The material sections of the New York Code, the effect of the expert evidence, and the conclusions drawn from it by the court, are sufficiently quoted and stated in the judgment of the President.

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Duke, K.C., and **Grazebrook**, for the petitioner.

M. Shearman, K.C., and **Barnard**, for the respondent, the wife.

The President (Sir Gorell Barnes), after some observations as to the difficulty the court had been placed in owing to the conflicting evidence of the American lawyers as to the law of the state of New York, said he would have wished to have prepared a more considered judgment, but having regard to the view he was taking of the case he did not think it necessary to reserve it, but that he gave it with this reservation, that the view he was expressing was the one that struck him at the moment. His Lordship then stated the facts, and continued: It is said that [212] the first marriage of Mrs. Lowe had been dissolved by a court of competent jurisdiction in the state of New York prior to her marriage with Mr. Bater, and that therefore she was free to marry. On the other side it is said that the proceedings in New York had not had the effect, when they are examined, of dissolving her marriage, and therefore she still remained the wife of Mr. Lowe (that is the petitioner's case), and therefore his marriage with her is bad. Her case is that she was properly divorced, that the marriage with Bater was good, and that therefore this suit is not properly founded. The question, therefore, in this case depends, as counsel have agreed, entirely on the question of whether the divorce proceedings in the state of New York had the effect of dissolving the marriage of Mr. and Mrs. Lowe, and, as part of that question, whether that effect is recognized in this country. Now it seems to me that that question depends upon several points, but only one is of real difficulty, and that depends upon whether the courts of New York had jurisdiction to dissolve the marriage. That is the main point in the case, and that turns upon the question of the exact law of the state of New York applicable to this case. There are, I think, three further points which affect the matter, though they, I consider, affect it in a minor degree. The first of those three points is whether the divorce in New York, assuming the court had jurisdiction, being for a cause which would not have alone entitled the petitioner to a divorce in this country, would be recognized in this country as a valid divorce. The second point

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is whether the decision of the court of New York is affected so as to be treated as nugatory in this country by reason of the fact that the petitioner in New York withheld from the court facts which, if brought out before the court, would have been a bar to her suit. The third is a point which was indicated, but I do not think very much pressed, by Mr. Shearman,—whether this court had jurisdiction to entertain a nullity suit, to declare null a marriage which was effected in another country; in this case, in the state of New York. Now, dealing first with what is the real and main point in the case,—the American law. The law itself is contained in § 1756 of the New York Code. That is in these terms: "In either of the following cases, a husband [213] or a wife may maintain an action against the other party to the marriage, to procure a judgment, divorcing the parties and dissolving the marriage by reason of the defendant's adultery: (1) Where both parties were residents of the state, when the offense was committed. (2) Where the parties were married within the state." (That is not applicable here, because the parties to that suit were not.) "(3) Where the plaintiff was a resident of the state when the offense was committed, and is a resident thereof when the action is commenced. (4) Where the offense was committed within the state, and the injured party, when the action is commenced, is a resident of the state." The clause that is most applicable to the present case, as I understand from those who have given evidence here, is the first clause,—"where both parties were residents of the state when the offense was committed." It is true the latter clauses have a bearing, because they are independent of the position which the defendant is occupying, and they are dealing with the case where a wife appears to have an independent residence and an independent domicil. Now the question turns partly on the Code and partly on the facts. I think the facts that ought to be found are these: First, that Mr. Lowe was domiciled in New York at the time of the suit and at the material time before; secondly—and this I practically take from the admission made by her counsel, Mr. Shearman—that the wife was not in a true sense, as an independent person, permanently domiciled in the state of New York. Her position was that she had gone there for the purpose of obtaining this decree if she could, and with the ultimate inten-

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tion, if she failed, of remaining to earn her own living. Those appear to me to be the positions of the two parties during the time when the proceedings in New York were going on. Now, having stated what those facts are, one has to endeavor to ascertain what is the true view of the law in this state of New York and to apply that law. The law itself, as I said, is contained in § 1756; but there is one other section that has some bearing on it which was referred to principally by Mr. Barratt, it is § 1768: "If a married woman dwells within the state when she commences an action against her husband, as prescribed in either of the last two articles,"—one of those articles [214] being the one that contains § 1756,—"she is deemed a resident thereof, although her husband resides elsewhere." He used that section as fortifying the view he expressed on § 1756. Now, in an ordinary sense, of course, both these people were resident in the state of New York at the time when the suit was proceeding. But the learned lawyers who have been called before me are both agreed upon this point, that the court in New York would treat in ordinary circumstances the term "resident" as having practically an equivalent effect to our word "domicil,"—in other words, permanently residing in a permanent home in the state. But they differ, and differ, I think, entirely as to the application of the term "resident" to the present case. To state it shortly, the view presented for the petitioner is that, although the husband is, as I have found, permanently resident, and in our sense domiciled in the state of New York, the wife must also, if she is not in fact living with him at the time, so as in fact to have his own domicil—if she is living separately up to the time she comes there—in order to maintain a suit in the New York court she must be also separately, permanently domiciled in the state of New York; in other words, be there with the permanent intention of remaining. So that each of the two parties must have a separate, or, if they are living together at the time of the suit, a united permanent home; but they must both have, either in one way or the other, a permanent home in the state of New York. The view presented on the other side is this,—that, the husband being domiciled in the state of New York, the ordinary principle of law established, one may say, throughout the whole civilized world,

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is that the wife's domicil is, legally speaking, the domicil of the husband, unless she has done something to acquire an absolutely independent and separate domicil, and that that is existing at the time of the suit; so that when this Code has to be construed and treated for the purpose of its application by a court dealing with persons situated as these two people were, the proper interpretation and application of it according to New York law would be that the husband's domicil being in the state of New York, the wife having come there with the object of maintaining a suit against him, she has in [215] fact elected, so far as is necessary for the purpose of applying the section to herself, to have the same domicil as he has,—in other words, to become a resident sufficiently within the meaning of that section for the courts to apply their process. Those, I understand, are the two opposing views of the law of New York that are presented for consideration in this case. Now I feel it is practically impossible for me to reconcile those two views; and I feel that one is presented with a serious difficulty, because one has, so to speak, to place oneself in the same position as a judge in the state of New York would be in if this point was raised before him,—in other words, to ascertain, through him, what is the rule he would apply in deciding this case; because it is said by both counsel that there is no authority on the subject in the state of New York,—no definite decision one way or the other,—and that it is, therefore, except so far as the experts express their views about it, an open question, and it is of very little use to go through the evidence which has been given about the matter in detail. I think I have sufficiently stated it in the course of what I have said. From the petitioner's point of view it is very clear. [Having read *in extenso* some of the expert evidence, the President continued:—] Mr. Barratt gave evidence, a short summary of which I have taken down, and it is this: General residence is tantamount to domicil; a wife may prove a separate domicil in cases of necessity—which, I understand him, is the principal object of introducing the 3d and 4th subsections of § 1756. This does not prevent her claiming his domicil as hers, and for that proposition he claims the authority of *Hunt* v. *Hunt* (1878) 72 N. Y. 217, 28 Am. Rep. 129. On the other side it is not necessary to read the evidence. It is very clearly stated by.

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Mr. Crane as involving two separate permanent domicils. That being the state of things, it seems to me that I have to ascertain, so far as lies in my power, upon what principle of law the courts of New York would endeavor to solve this problem. I cannot help thinking there would be this consideration in the outset to guide them. In a case such as this it is said that the wife could maintain a suit in this country (assuming, of course, that she had not been barred by previous matters) against a husband [216] who has separated and gone to America and become domiciled there; and there are many cases in which that has been allowed in undefended cases. I am not at the present moment aware—and I would desire to reserve any careful consideration of that point—how that matter would be treated if the case were really put on the domicil of the husband abroad. But in many of the undefended cases what happens is, that the wife is deserted in England. The husband goes to America, nothing is heard about him, and the court, in order to do justice, either acts upon the view that the husband has not come forward to prove another domicil, and possibly could not be heard to say that he had another domicil when he deserted his wife in this country; or, as some have thought, that a woman may be treated as having been left in a separate domicil of her own, and, to do justice, she is not bound to follow the husband all over the world from place to place, and so may get relief in this country. However that may be, that is a difficult point, and one which does not in the least, to my mind, oust the foreign court, assuming that it has jurisdiction, from saying, If you have come to our court and your husband is domiciled here, we will, apart from our statutory difficulties, give you relief. Then, supposing that case is presented to the court in New York, the court would very naturally say, Apart from being tied by the section, your husband is domiciled here; his home is here, and prima facie yours is here. You have come here to pursue him and obtain your remedy. Why should that remedy be withheld because, if you succeed, you propose to return to your own country? I should have thought myself, as a matter of justice, expediency, and convenience, it was very proper to allow a suit to be entertained in a foreign country in these circumstances, and I cannot help feeling that considerations of that character would weigh very con-

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siderably with a judge in the state of New York in deciding whether under such a term as the term "resident" he was to exclude the petitioner from her right to maintain a suit. After giving this matter my best consideration, and endeavoring to decide partly as a matter of principle in the difficulties in which I am placed and partly guided by the evidence that has been given (I may say I was [217] extremely struck with the very clear and forcible way in which Mr. Barratt gave his evidence), I have come to the conclusion that this suit could have been maintained in the state of New York, and therefore, if that is the only question to be determined, that the decree was a good decree. But that does not entirely dispose of the matter, because there are the other three points that I have mentioned. The first of those is whether, this being a decree on a ground which would not be a ground of divorce without something added to it in this country (because it was a divorce on the ground of adultery only), it would be recognized in this country. According to my view that matter has been long ago set at rest, and I need not do more than refer to the very long and full judgment delivered by the late Lord Hannen in the case of *Harvey* v. *Farnie* (1880) 5 P. D. 153, 49 L. J. Prob. N. S. 33, 42 L. T. N. S. 482, 28 Week. Rep. 723, (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703. The headnote is this, as far as it is necessary to refer to it: "The English courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction and an Englishwoman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although the marriage may have been solemnized in England and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England." I think myself that that has become at the present day almost certain clear law, and it is based upon the simple proposition that if this country recognizes the right of a foreign tribunal to dissolve a marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country, even though that law would dissolve a marriage for a lesser cause than

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would dissolve it in this country. Absurd results would follow if that were not so, because by the law of the domicil they would cease to be husband and wife, and yet if they returned to this country they would be husband and wife. That is not convenient, nor is it logic, and I think if they were bona fide and properly domiciled in the country where it takes place it is a good divorce. The next point is on the question of fraud. [218] It is said that this court will not recognize the validity of the decree in America because it was obtained by the suppression of facts which if brought to the attention of the court out there would have prevented its granting a decree. Now both the two leading lawyers who have been called on each side agree that in America, while that decree stands, it would be a good decree, even though it was obtained by withholding material facts. They have not any machinery for intervention out there, there being no official like the King's Proctor, as we have, and they seem to consider that the decree is good, though the petitioner was guilty of an offense which would have debarred her from getting a decree, unless that decree was set aside. Now it does not follow from that that this court would recognize that decree as binding if obtained in such a way, and Mr. Duke argued that in many of the judgments it has been said that the courts will not recognize the decree of a foreign tribunal where it has been obtained by the collusion or fraud of the parties. But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the court. In other words, as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicil, and therefore collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicil there is no jurisdiction. But supposing that what was kept back was something that would have made the court come to a different conclusion than it would otherwise have done, I can see no valid reason in

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the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside. In this court there are many cases where facts are kept back. In some, of course, the King's Proctor successfully intervenes, but I have no doubt that in many others the facts escape attention; but it has never yet been argued that a decree [219] made and become absolute is not binding, though if it had been interfered with before it became absolute it could have been set aside. The one form always is to set aside a decree, and not treat it as a nullity because somebody has withheld something. I think these cases differ in their results from cases where there is a decree *inter partes* simply, and upon an action brought on a foreign judgment fraud can be pleaded to that foreign judgment, and if successfully pleaded, then there is a defense, and that is because the court will not enforce that foreign judgment. Nothing is done to set it aside, but it is not enforced. That, I do not think, is applicable to cases like this. There is some sort of authority, namely, in the case of decrees *in rem*. In the case of *Castrique* v. *Behrens* (1861) 30 L. J. Q. B. N. S. 163, the matter was one which has a certain amount of bearing on the question, as will be seen by the short statement of facts in the headnote: "Declaration that the captain of an English ship while on a voyage drew a bill of exchange on the then owners for the necessary disbursements of the ship, and the bill was dishonored at maturity; that the plaintiff had in the meantime become mortgagee of the ship; that by the French law the bona fide holder for value of such a bill, if a French subject, can take proceedings *in rem* in the French courts, and attach and sell the ship in a French port in order to pay the bill; that the defendants, being English subjects and the holders of the bill, after it had been dishonored conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts and falsely represent that he was a bona fide holder for value; that this was accordingly done, and orders were thereby obtained from the French courts that the ship should be attached and sold in a French port; and the plaintiff was thus deprived of his property in her:—Held, that the declaration was bad, as an action could not be maintained while the judgment *in rem*, though in a foreign court and obtained as alleged, remained unreversed."

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That is analogous to what I have been endeavoring to indicate, and I think (though I do not think it is strictly necessary to lay this down absolutely in this case), that the foreign decree remaining [220] unreversed is binding. I say that, because I am not going to lay down that there are no circumstances outside the question of jurisdiction which would render decrees of this character not properly recognizable in this court. But where a person endeavoring to complain in a case is the person who is a party to what has been done, I do not think it right to help him, and that he should be allowed to come forward and quarrel with what has been done and then endeavor to set aside a decree which he has recognized, taken advantage of, and acted upon for years, and then seek to invalidate it upon exceedingly technical and refined grounds. That leads me to the last point which was mentioned by counsel, and that is that this suit is between persons both domiciled in this country; and the question is whether the court will entertain a suit dealing with a New York marriage, or must the parties go to New York? The latter is, to my mind, a most extraordinary suggestion, because it would mean that the two people wishing to know if they are truly married and properly living together as man and wife, must go to America to find that out. It is perfectly true there are cases which show that although the parties are not domiciled in this country, but are before the court in this country, the court may inquire into the validity of the marriage contract in this country; that is to say, this court, I think, has held, in the case of a marriage between two persons who are not British subjects—who are not domiciled in this country, but who are here parties to the proceedings—it can inquire into the validity of a marriage contracted in England. But that only means that there may be two courts that have jurisdiction, that the jurisdiction is not exclusively that of the court of the country where the marriage was celebrated. It may be also, I think, that the court of the country in which, though the marriage was not celebrated in it, the parties are domiciled at the time when the suit in question is raised between them has jurisdiction. There is an authority for that proposition in the case of *Ruding* v. *Smith* (1821) 2 Hagg. Consist. Rep. 371. Professor Dicey, in his Conflict of Laws, cites that case. I have referred to it, and it is not neces-

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sary for my judgment that I should go through it, but [221] he cites it for this proposition at p. 394 of his book: "Two points are clear, first" (that is the only one I need deal with): "The courts of a country where a marriage is celebrated have no exclusive jurisdiction to determine its validity, for our courts will determine the validity of a marriage celebrated abroad;" and having referred to that case, I find that the question of the validity of a marriage at the Cape of Good Hope between British subjects who would appear to have been domiciled, the husband in England and the wife in the East Indies, or possibly in England, was inquired into and determined by the Consistory Court of London. While I am referring to Mr. Dicey's book, I may, perhaps, be permitted to point out that Mr. Dicey, in dealing with that question to which I have already referred, says (p. 391): "The courts of a foreign country, possibly, have no jurisdiction to dissolve an English marriage." I am not sure in what sense he is using the word "English" there, because that is sometimes used as meaning a marriage celebrated in England and sometimes as meaning where the parties are living in England. He puts two notes of interrogation against that possible exception, and winds up by saying: "The validity, indeed, of the exception is open to the gravest doubt; it is not supported by a single reported case, and is a mere deduction from the principle which English courts have now, on the whole, surrendered, that the right to a divorce depends on the terms of the marriage contract." I think, as far as I am concerned, I can dispose of that now, and I hope we shall not be troubled with it any more. The result of a somewhat lengthy elaboration of this case—partly because of the general importance of it, and partly because of the importance to the particular parties—is that in my judgment this suit fails and the petition must be dismissed with costs, and I only desire to conclude my judgment with this,—that I think it would be a very hard and unreasonable result if one had to come to another conclusion, as the whole of this difficulty arises from the action of the petitioner himself.

Petition dismissed.

The petitioner appealed. The appeal was heard March 17, 19, and 20.

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[222] **Duke**, K.C., and **Grazebrook**, for the appellant. The question of the validity of the marriage between the petitioner and the respondent depends upon the question of the validity of the divorce proceedings in New York. First, the court of New York had no jurisdiction to make the decree, because the parties at the time of making the decree were not domiciled in New York. The question of domicil must be determined by the law of England, and there may be a question whether the former husband, Francis Lowe, had done enough to devest himself of his domicil of origin. But assuming that the husband had acquired a domicil in New York, the further question arises whether it was sufficient for the wife to take proceedings against him in New York, thereby adopting her husband's domicil, or whether something more was required. The balance of evidence is in favor of the view that residence by the wife in New York was essential, and that that residence must be almost equivalent to domicil. That appears from the New York Code, and the judgment of the court of New York itself showed that it was not the law of that country that a wife abandoned by her husband could take advantage of her husband's domicil for the purpose of procuring a divorce. The proper inference from the evidence is that the wife did not acquire any separate residence or domicil in New York.

Secondly, the decree is void by reason of the suppression by the wife of the divorce proceedings in this country and of her own adultery, since by the law of New York adultery is an absolute statutory bar to obtaining a divorce. This decree was therefore obtained by fraud, and cannot stand.

Thirdly, in the case of an English marriage a decree of divorce obtained by the wife in a foreign country on the ground of adultery alone is not good in this country. *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, which shows that an English marriage cannot be dissolved by a foreign tribunal on grounds which could not be sufficient to dissolve the marriage in this country. That case has been considered in many subsequent cases in this country. *Warrender* v. *Warrender* (1835) 2 Clark & F. 488, 9 Bligh, N. R. 89; *Dolphin* v. *Robins* (1859) 7 H. L. Cas. 390, 414, 3 Macq. H. L. Cas. 563, 29 L. J. Prob. N. S. 11, 5 Jur. N. S. 1271, 7 Week. Rep. 674, 9 Eng.

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Rul. Cas. 714; *Geils* v. [223] *Geils* (1852) 1 Macq. H. L. Cas. 255; *Shaw* v. *Gould* (1868) L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833; *Shaw* v. *Attorney-General* (1870) 2 P. & D. 156, 161, 39 L. J. Prob. N. S. 81, 23 L. T. N. S. 322, 18 Week. Rep. 1145; *Harvey* v. *Farnie* (1880) 5 P. D. 153, 156, 49 L. J. Prob. N. S. 33, 42 L. T. N. S. 482, 28 Week. Rep. 723, (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703; and it may be that the resolution in *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, as it stands, goes too far. See *Shaw* v. *Gould* (1868) L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833; but upon its own facts it has never been questioned. Treating an English marriage as implying that the husband at the time of the marriage was domiciled in England, it is submitted that *Lolley's Case, supra,* is still law. In *Harvey* v. *Farnie* (1880) 5 P. D. 153, 156, 49 L. J. Prob. N. S. 33, 42 L. T. N. S. 482, 28 Week. Rep. 723, (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703, upon which the President proceeded, the husband was a domiciled Scotsman, and that case falls entirely within *Warrender* v. *Warrender* (1835) 2 Clark & F. 488, 9 Bligh, N. R. 89, where *Lolley's Case, supra,* was expressly recognized as an authority. In *Scott* v. *Attorney-General* (1886) 11 P. D. 128, 56 L. T. N. S. 924, where the case is more fully reported, 55 L. J. Prob. N. S. 57, 50 J. P. 824, there was a decree which gives the go-by to all these cases, but the decree was made without discussion.

[**Romer, L.J.:** At the time of *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, divorce could only be obtained by special act of Parliament. May not that fact have influenced the minds of the judges in that case?]

The point that divorce was then in form legislative does not appear to have been taken in any discussion of *Lolley's Case, supra,* but in effect it was judicial.

[**Romer, L.J.** *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, is only applicable where the facts are precisely similar. See *Harvey* v. *Farnie* (1880) 5 P. D. 153, at p. 162, (1880) 6 P. D. 35, at pp. 44, 45.]

The decree of a foreign court obtained by fraud or collusion

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is not entitled, internationally, to recognition; fraud avoids all judicial acts, civil or ecclesiastical. *Duchess of Kingston's Case* (1776) 2 Smith, Lead. Cas. 11th ed. 731, 20 How. St. Tr. 537; *Shedden* v. *Patrick* (1854) 1 Macq. H. L. Cas. 535; *Bonaparte* v. *Bonaparte* [1892] P. 403, 62 L. J. Prob. N. S. 1, 1 Reports, 490, 67 L. T. N. S. 531.

[Cozens-Hardy, L.J.: That last case was one of want of jurisdiction.]

Yes, but it was treated as a case of fraud on the court; and it is very like the present case.

Barnard, K.C. (**M. Shearman,** K.C., with him), for the respondent, the wife. The New York court had jurisdiction to annul the English marriage from the fact that both parties were then [**224**] resident in New York, and in this case the English court will accept the decree of the New York court. It is clear that Mr. Lowe was domiciled in New York.

[Collins, M.R.: We are satisfied that Mr. Lowe had acquired an American domicil.]

Mrs. Lowe also had acquired a domicil in New York. The American law allows a wife to acquire a domicil in the same state as her husband; the husband's domicil is, in fact, the wife's also, when she resides in the same state; therefore, if the wife chooses, bona fide, to go to the husband's place of domicil, she is entitled to do so. The President accepted Mr. Barratt's evidence on this point; therefore, as a matter of law, the American court had jurisdiction to dissolve the marriage.

Lolley's Case (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, has been explained in numerous subsequent decisions; it was fully discussed in *Harvey* v. *Farnie* (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703, and that case is in favor of the respondent, and is precisely in point. The respondent relies, too, on the judgment of Brett, L.J., in *Niboyet* v. *Niboyet* (1878) 4 P. D. 1, at pp. 9 to 20, 48 L. J. Prob. N. S. 1, 39 L. T. N. S. 486, 27 Week. Rep. 203. The material circumstance to be considered is the domicil of the parties at the time of the institution of proceedings; it is the domicil that gives jurisdiction. *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 11 Reports, 527, 72 L. T. N. S. 873.

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It has been urged that the divorce was not good because it was pronounced by the court of a country which was not the country of the marriage, but that proposition cannot be supported. *Scott* v. *Attorney-General* (1886) 11 P. D. 128, 55 L. J. Prob. N. S. 57, 56 L. T. N. S. 924, 50 J. P. 824. The judgment of the New York court is a judgment affecting the status of the parties, and is in fact a judgment *in rem* which cannot be impeached in proceedings taken in this country by a person who was not a party to the proceedings in which that judgment was pronounced. *Castrique* v. *Behrens* (1861) 30 L. J. Q. B. N. S. 163, 3 El. & El. 709, 7 Jur. N. S. 1028, 4 L. T. N. S. 52.

There is no evidence of collusion between Mr. and Mrs. Lowe in this case. There was no fraud; the fraud alleged is the concealment of the fact that there had been proceedings in England which had failed in consequence of the wife's adultery; but the wife was not bound to state this in her pleadings, and the husband, though he might have raised it in his absence, put in no plea to [225] this effect in accordance with the New York Code, § 1758. At the utmost there was simply an irregularity in the proceedings, which is not sufficient to upset the judgment. *Pemberton* v. *Hughes* [1899] 1 Ch. 781, 68 L. J. Ch. N. S. 281, 47 Week. Rep. 354, 80 L. T. N. S. 369, 15 Times L. R. 211. The judgment of the American court is final and binding unless it can be shown that there was no jurisdiction.

The *Duchess of Kingston's Case* (1776) 2 Smith, Lead. Cas. 11th ed. p. 731, 20 How. St. Tr. 537, was only a case of jactitation of marriage. Hawkins' Pleas of the Crown, 8th ed. *Shedden* v. *Patrick* (1854) 1 Macq. H. L. Cas. 535, only goes to the question of jurisdiction.

Duke, in reply, referred to *Briggs* v. *Briggs* (1880) 5 P. D. 163, 28 Week. Rep. 702, 49 L. J. Prob. N. S. 38.

Cur. adv. vult.

Collins, M.R., after stating the facts, continued: A great variety of points were taken in argument to establish the contention that, first, there was no jurisdiction in the court in New York to entertain the matter at all by reason of the failure to perform the conditions precedent imposed by the law governing the

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matter in the state of New York. That, of course, raised a question of foreign law, namely, the question of the proper construction of the New York Code which governed the proceedings, and there was a great contention whether Mrs. Lowe had brought herself within the provisions of the law of New York so as to entitle her to appear and ask for a divorce in the American court. There was also another contention going to the same point, and in fact going to the root of the whole position, namely, that even if she had performed the conditions precedent within the meaning of the New York marriage law, her husband had never been domiciled in New York state, and that, therefore, she was not in a condition, by reason of the absence of the domicil of the husband, and, consequently, of the absence of domicil in herself in New York, to initiate these proceedings at all.

There were also other points which were argued and insisted upon, namely, first of all, that this divorce in New York, even if in other respects it was unimpeachable, that is to say, if there was jurisdiction and domicil, still there was a flaw, inasmuch as [**226**] it had been brought about by collusion between the husband and the wife. Another ground was, that apart from collusion, it was vitiated by fraud, inasmuch as the lady had kept back from the New York court the fact that she had been found guilty of adultery in the proceedings in England; and that, according to the marriage law of New York, if that fact had been avowed, the American court would not have given her the relief, which she sought, in granting a divorce.

Then, in addition to those points, and underlying them all, came the point which is the one that has taken up the greater part of the time in its development, and that was that even if all conditions required by the marriage law of New York were fulfilled, and there was no flaw in the decree, nevertheless, according to the well-known rule laid down in a case of great authority in this country, *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, an English marriage could not be dissolved by the decision of another court on grounds which would not have satisfied an English court if it had to deal with the matter. I think I have now stated nearly all the points that were put before us by Mr. Duke in his very able and interesting argument.

Now, first of all, I will deal with that part of the case which

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depends wholly on fact. It was contended that Mr. Lowe had not himself acquired a domicil in New York. That was a question of fact, and upon the facts the court below was satisfied that Mr. Lowe had acquired a real bona fide domicil in the state. It seems to me that when one looks at the evidence, as we were bound to do, the evidence on that matter is all one way. Mr. Lowe had every reason for leaving this country, and he left without apparently any intention of returning at all. He took out letters of naturalization in America, and he went out with the woman with whom he had been living before, and he was cohabiting with this woman in New York. The evidence points clearly to the conclusion that he had renounced all intention of resuming his English domicil of origin, and had made himself, with the full intention of remaining there, a citizen of New York. That perhaps is the most material point of fact in the whole case.

[227] Then comes the question, which was very much debated, whether under the circumstances of this case Mrs. Lowe had put herself into a position to entitle her to avail herself of the proceedings for divorce in America. Now that raised a question of law upon the true construction of the New York Code, and whether the better opinion was that she could attract to herself the acquired domicil of her husband, Mr. Lowe, who, on the hypothesis I have accepted, was a domiciled citizen in New York, and was entitled to follow him and take proceedings against him in New York, by virtue of his domicil in New York, his domicil becoming hers. There was a good deal of discussion among the American experts called on that point, and the learned President, after a very elaborate investigation of the matter, came to the conclusion that it was competent for the lady, according to the law of New York, to take the proceedings she had taken, even although she had an intention herself of returning to her British domicil as soon as she had got her divorce. That was his view of the result of the American law. That is a question of fact, and I see no reason to differ from his view,—in fact it entirely accords with my own view formed upon reading the evidence of these experts. Therefore, it seems to me that we have got to this point, that there clearly was jurisdiction in the American court, as the court of the domicil, to deal with the matter.

Then the next question is, Is that vitiated by collusion, or in

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other words, by fraud? There really was no evidence of collusion, and Mr. Duke very faintly contended that collusion had been established. It is quite clear there was no collusion in the sense of the two parties having conspired together to deceive the New York court in arriving at the conclusion at which it did arrive. The evidence was that steps had been taken to serve Mr. Lowe out there. There was no evidence of any meeting between Mr. Lowe and Mrs. Lowe, or of any collusion, and, therefore, the case must be dealt with on the footing that there was no such fraud, in the shape of collusion, as to vitiate, if it would vitiate, the proceedings.

Then comes another point, namely, the suppression, as it was said, by the lady of the fact that she had been found guilty of [228] adultery in the English proceedings. It was said that, the decree having been obtained on those grounds, that was enough to avoid it in proceedings in an English court. Upon that Mr. Duke was met by what the President considered afforded a complete answer, namely, that that is a judgment affecting the status or a judgment which, if not technically *in rem,* stands on the same footing as a judgment *in rem.* There is a good deal of authority to show that it is really indistinguishable from a judgment *in rem.* Some of the judges seem to have considered that for some reason it is not an absolute judgment *in rem,* but for all purposes it is on the same footing, that is to say, it is a judgment affecting the status of the parties. If it is a judgment *in rem,* or stands on the same footing, as I think it undoubtedly does, can it be impeached in proceedings taken in this country by a person not a party to that judgment at all? Can proceedings effectually be taken in this country while that judgment stands unimpeached in the country where it was made? There is clear authority in our courts that that cannot be done, and I think it is the authority on which the President acted.

The point arose in the case of *Castrique* v. *Behrens* [1861] 30 L. J. Q. B. N. S. 163, 3 El. & El. 709, 7 Jur. N. S. 1028, 4 L. T. N. S. 52, the headnote of which is sufficient to explain the point. [Having read the headnote, the Master of the Rolls continued:—] There the demurrer had admitted fraud of the most unequivocal character on the part of the persons who conspired together to give an apparent title to a person as a bona fide holder

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for value, whereas he had, in point of fact, taken the bill without value, and simply as part of the conspiracy to defraud the defendant. Under those circumstances, although the judgment was obtained by fraud, it was held to be binding in proceedings in this country, inasmuch as an action could not be maintained while the judgment *in rem,* although in a foreign court, and obtained in that way, remained unreversed. That is an authority directly in point on that part of the case, but I am not at all satisfied that there was any such fraud shown as a matter of fact in this case. I think there is a great deal to be said for the view put before us by Mr. Barnard, that the fact of the adultery in England was an issue to be raised by plea, and there was [**229**] no plea. The defendant Lowe, being cited, was in a position, had he chosen to meet the case made against him, to bring that forward before the court. But it is not necessary to decide on that ground. Therefore, for the reasons I have stated, if there were fraud in obtaining the judgment *in rem,* it could not be availed of in proceedings in this court having for their object the impeaching of that judgment.

That brings me, I think, to the last weapon in Mr. Duke's armoury. Admitting all those things, and that the decree of the court with regard to parties having their domicil in the country of that court, was unimpeachable on the ground of fraud in that court, aye or no, is it possible that the decree of a foreign court can undo an English marriage on grounds short of those which would be essential in this country? Mr. Duke relies, as I have said, on *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, as justifying his contention that the marriage could not in those circumstances be dissolved. Now *Lolley's Case, supra,* was decided as far back as 1812. It is not a decision of the court, but it is a resolution of all the judges; and what the judges resolved was this (Russ. & R. C. C. at p. 239): "The judges held the conviction right, being unanimously of opinion that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii* for ground on which it was not liable to be dissolved *a vinculo matrimonii* in England;" and so on. I need not read the rest. That, I have no doubt, was a most authoritative pronouncement of all the judges, and I think Mr. Duke was right in saying it has never been in

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terms overruled by the House of Lords; but, nevertheless, it has been explained in a number of cases which I do not propose to go through, because, I think, there is one case, the last of all, in which the whole position has been summed up. I may perhaps refer to one case before that, which certainly puts a very marked limitation on that proposition. That was a case in the House of Lords of *Harvey* v. *Farnie* (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703. In that particular case a native of Scotland, who had at the time no other domicil, married an Englishman. They then went to Scotland and lived there, and both of them had, by virtue of the marriage, a Scottish domicil. [230] Proceedings were taken for a divorce in Scotland, and a divorce was granted on a ground that would not be sufficient to procure a divorce in England, and it was held that that divorce, although involving the annulling of a marriage, English in one sense, was good by reason of the fact that it was a decision of the court of the domicil. There, no doubt, the original domicil was Scotch, but, nevertheless, the English marriage was held not unimpeachable by a person of Scotch domicil, although solemnized in England. The words must be limited to an English marriage so as not to embrace a marriage which, although solemnized in England, was solemnized with a man of another domicil. That left it still open whether, if the marriage in England was a marriage between domiciled English people, it could be undone by a court where those persons had afterwards acquired a fresh domicil,—the domicil of the country where they were settled. That point was still left open, but there were many *dicta* and expressions of opinion that the governing factor in all these cases ought to be domicil, and if you have a bona fide domicil in the country where the proceedings for divorce were taken, those proceedings ought to govern the matter and are valid and effectual. That point was not expressly decided in the House of Lords in *Harvey* v. *Farnie, supra,* although there were many *dicta* of the noble Lords which undoubtedly pointed in that direction.

In that state of the authorities the question came up before a very strong court in the Privy Council in the case *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 11 Reports, 527, 72 L. T. N. S. 873. The board in that case con-

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sisted of Lord Herschell, the then Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Richard Couch, and although the particular point I am referring to was not necessary for the actual decision of the case, still it was a considered statement of the law upon the point; and in a sense it was necessary, because they could not decide the actual point before them without laying down a general principle of law in the matter. The headnote does not necessarily involve the position which is in discussion in this case, but I will read it, and then read the passage which I think is the most authoritative in our law upon this matter. The headnote is as follows: "The matrimonial law [231] applicable to British or European residents in Ceylon is the Roman-Dutch law as it existed in the colony at the date of the Royal Proclamation of the 23d of September, 1799; and that law did not contain any rule specially conferring on the local courts divorce jurisdiction *a vinculo* over European spouses resident in the island, but whose marriage and domicil were in England. Held, further, that the permanent domicil of the spouses within the territory is necessary to give to its courts jurisdiction so as to divorce *a vinculo* as that its decree to that effect shall by the general law of nations possess extraterritorial authority. A so-called 'matrimonial domicil,' said to be created by a bona fide residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicil, cannot be recognized as creating such jurisdiction." In that case persons who were married in England and were domiciled English people went to Ceylon, and the question was whether the court of Ceylon had acquired jurisdiction over them by virtue of residence without acquisition of domicil so as to effectually undo an English marriage, and it was held it had not, because they had acquired a so-called matrimonial domicil instead of a real bona fide domicil. If they had acquired a real permanent domicil then, in the view of the court, the court of Ceylon would have had jurisdiction to undo the marriage. This case refers, I think, to all the cases—certainly to all the important cases—upon the subject, and reviews them all, and at the very end of the judgment, on p. 540, Lord Watson says: "Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international

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law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson* v. *Wilson* (1872) L. R. 2 P. & D. 435, at p. 442, which were obviously meant to refer not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases [232] referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.' "

It seems to me, therefore, that the law now unquestionably stands in this position: That the court of the existing bona fide domicil for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country. It seems to me that that is the law now, applicable to this case because we have it as a fact that the domicil of the parties, through the husband, was an American domicil,—a domicil in the state of New York, and that therefore the divorce obtained in New York governed their rights everywhere else.

In my opinion, therefore, the President was perfectly right in refusing to give the plaintiff the relief he sought, and this appeal must be dismissed, with costs.

Romer, L.J.: I am of the same opinion. Having regard to the importance of the case, I think it will be right for me to make a few observations on some of the points arising for decision. I will first deal with the objection taken to the divorce decree on the ground that the New York court had no jurisdic-

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tion to entertain that divorce action, or to grant the decree. Now, that question may have to be regarded from two points of view. In the first place, it may be regarded from the point of view of the law of the state of New York; and, in the second place, from the point of view of the law of England as regards the question of jurisdiction. I will first take the question of jurisdiction from the point of view of the law of the state of New York. According to that law, had the court [233] which pronounced this decree of divorce jurisdiction to entertain the action and to grant the decree of divorce? I think it had, for on the facts I think the judge came to a right conclusion, that the husband had changed his original English domicil, and had, at the time when the action was brought in the state of New York and the decree of divorce was pronounced, acquired a domicil in that state; and, undoubtedly, the adultery complained of by the wife in that action was committed in the state of New York. Therefore, so far as concerns the position of the husband according to the law of the state, the court had jurisdiction to entertain the action; but, according to that law also, it was necessary that the wife must reside in the state at the time of action brought. For the purposes of the expression "reside," I take it from the experts who have given evidence in this case that, speaking generally, residence may be taken to be equivalent to domicil; that is, domicil regarded from the point of view as to what constitutes domicil according to the law of the state of New York.

Now the question arises, Was the wife dwelling in the state at the time she brought this action? Undoubtedly, according to the law of the state, the wife, in the circumstances which happened here, could have had a separate domicil from that of the husband, but I take it that the wife might have exercised her option, and that she was quite entitled, if she chose, to say that her domicil still remained the domicil of her husband as assumed by him, that is to say, domiciled in New York state, and I think that by going, as she did, to dwell in the state for the purpose of bringing the action for divorce, and then bringing that action, it must be taken that she had elected to make that domicil, at any rate for the purposes of the action, the domicil of her husband in New York state; and I cannot see that there is any good reason why

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the wife, if she chose so to elect her domicil, should not have elected to take that domicil for the purposes of the divorce if she could obtain it. Moreover, taking the expert evidence as a whole, I come to the same conclusion as that arrived at by the learned President, namely, that the wife had, according to the law of the state of New York, when she brought this action, a residence there within the meaning of [234] the word as used in the Code governing the law in the state of New York. The result is that, dealing with the question of jurisdiction from the point of view of the law of the state of New York, the court had jurisdiction to entertain the action.

Then, how does the matter stand from the point of view of the English law? I have already stated that, on the facts, the husband had changed his domicil, and had acquired a domicil in the state of New York. According to the English law, until divorce the wife's domicil would be that of the husband, or, at any rate, might be that of the husband if she chose, to the extent of her electing to regard the changed domicil of the husband as her domicil, and there is no reason, according to English law, why she should not be at liberty, if she chose, to go abroad to the state of New York, electing for the purposes of the divorce proceedings, her domicil to be that of the husband and suing him there; and, according to English law, I take it that, at the time of action brought and divorce granted there, the domicil of both the husband and the wife was the domicil of the state in which the court in which the action was brought was situated, so that the court there had ample jurisdiction according to English law. Therefore, in whichever way the matter is regarded, it seems to me clear that the court granting this divorce had jurisdiction.

That brings me to consider that next question, which is this, Putting aside for the moment any question of collusion or fraud, was not the decree so given one which the English courts would recognize, although the divorce was granted in the state of New York on a ground which would not be sufficient in itself for the English courts to grant a decree of divorce? Dealing with that question, in the first place, as a matter of principle, it is difficult to see why the English court should not recognize that decree of divorce in the circumstances of this case. It is not as if it could be pretended that the celebration of marriage in this country was

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of a different kind, or had more sanctity, or effect, than a marriage constituted in any other Christian country; and, that being so, seeing that the question of divorce as between husband and wife is one affecting the status of the parties, why should not that question be capable of being solved and determined according [235] to the law of the country where the married people have their domicil at the time the question of divorce arises, and where the proceedings for divorce are accordingly taken? If the husband and wife, though married in England, go and live in a foreign country, and acquire a domicil there, why should the English courts refuse to recognize the validity of a decree validly granted by a court of competent jurisdiction, according to the law of the state in which the parties are domiciled? I cannot see. I know of no sufficient reason, nor is there, to my mind, any authority binding us which prevents us from giving effect to the view I have indicated. With regard to the resolution in *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567, which has been so often discussed and reflected upon, I take it to be settled that that resolution must be treated as being confined to the facts of the case in which the resolution was given, those facts being that the judges were dealing with a case in which the divorce judgment that was being questioned was given by a court in a country in which the parties divorced were not domiciled. I take it that the law of England at the present time is well stated in the case of *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 11 Reports, 527, 72 L. T. N. S. 873, to which the Master of the Rolls has referred, not only in the passage he quoted, but also in the following passage, which it may be worth while to read, as it particularly deals with the resolution in *Lolley's Case, supra.* In Lord Watson's judgment on p. 527 of the report, he says: "When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinions expressed by the English common-law judges in *Lolley's Case, supra,* give rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled, and

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the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw* v. *Gould,* L. R. 3 H. L. 55, at p. 85, in these terms: 'The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriages of its own subjects, is [**236**] competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bona fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case, supra.*' "

That being so, it appears to me that the second ground taken on behalf of the appellant fails.

I need only make a few observations with regard to the third ground on which the appellant bases his case, that is, the alleged ground that the divorce decree in the state of New York had been obtained by collusion and fraud. In the first place, on the facts, it is clear there was no collusion; and, secondly, with regard to the allegation of fraud, the only fraud suggested, or that could be substantially suggested, was said to arise from the fact that the wife, in the proceedings in the state, did not disclose the fact that she had herself been guilty of adultery. First of all, let it be noted that that nondisclosure cannot be said to go to the question of the jurisdiction of the court. Ought it, then, according to the law of this country, or according to the law of the state of New York, to be recognized as a ground which would make the decree one of no effect as matters stand? In my opinion that cannot be said. As was pointed out by the Master of the Rolls, if the husband had appeared (which he did not) to the divorce proceedings, it would have been his duty to plead, and to have put in an allegation, if he intended to rely upon it, that the wife had committed adultery. He did not put in an appearance, and accordingly there was no plea. Did the fact of no appearance being put in, and no plea by the husband, throw upon the wife any extra duty towards the court? I am not satisfied that it did. Nor even am I satisfied that if the adultery had been proved to the court in the state before the divorce decree had been pronounced, that would necessarily have been fatal to

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the right to obtain the divorce. I need not further dwell upon this consideration, for it is agreed by all the experts [237] who have given evidence in the case that the court in the state having once pronounced, as it did, a decree for divorce, that decree cannot be upset on the ground, as has been argued, of the nondisclosure of the fact of adultery on the part of the wife. That decree is valid and binding according to the law of the state of New York, where the parties, as I have pointed out, were domiciled, and the court had undoubted jurisdiction in the matter. No proceedings have been or could be taken in the state to impeach that decree which now stands, and certainly ought to be recognized by this court, not only on the ground, as it appears to me, that it was a judgment *in rem,* and therefore binding on this court so long as it stands, but I think, also, on another principle which is conveniently stated in the case of *Pemberton* v. *Hughes* [1899] 1 Ch. 781, at p. 790, where Lindley, M.R., says: "If a judgment is pronounced by a foreign court over persons within its jurisdiction, and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case, which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

Bearing that principle in mind, it appears to me it cannot be said that, according to English law, our idea of substantial justice requires us not to recognize the validity of the decree of the court in the state of New York for the reason, among others, that we have ourselves a similar law. If a decree absolute for divorce had been obtained in this country at the instance of the wife, and the adultery of the wife had not been disclosed, these courts would not allow that decree to be impeached on any suggestion after [238] the time had elapsed in which the decree had

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become absolute. Certainly it cannot be said that our English notions of what substantial justice requires necessitate any interference by our courts with the validity of the decree for divorce in the state of New York in this case. For these reasons I think this third objection taken by the appellants fails, and the appeal, consequently, altogether fails.

Cozens-Hardy, L.J.: The only question in this case is as to the validity of a decree of divorce granted in the state of New York, the marriage having been celebrated in England, between persons domiciled in England. The marriage was in 1880. In 1889 the husband went to New York, having separated from his wife, and I think it is clearly established that in 1890, when the divorce proceedings were instituted, he had abandoned his English domicil, and acquired a domicil in the state of New York. His wife, who was living in adultery in England, went over to New York for the purpose of obtaining a divorce from her husband, who was living there in adultery. There was no collusion between the husband and wife, but the fact of the wife's matrimonial misconduct in England was not brought to the notice of the New York court. Under these circumstances the true inference of law is that the wife, who presumably, if not necessarily, had her husband's domicil, by her conduct manifested her election to treat herself as not having a separate domicil, but as following her husband's domicil in New York. This being so, it is now settled by authority, which binds us, that the court of the country in which the parties were domiciled—that is to say, New York—was the court having jurisdiction to decree a divorce, even though the divorce was granted for a ground which would not be sufficient in England. *Harvey* v. *Farnie* (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703, and *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 11 Reports, 527, 72 L. T. N. S. 873, seem to establish this proposition beyond doubt. The evidence as to the law of New York given by four experts was not wholly consistent, but I see no ground for differing from the view of the President on this point. He held that the evidence given by Mr. Barratt was upon the whole to be preferred, and moreover, that it was in accordance with general prin-

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ciples. The [239] result is that the decree of divorce was valid. It cannot be questioned by the appellant in New York on the ground that facts were suppressed. It is conclusive there unless and until set aside, and I see no ground for allowing its validity to be impeached in this country. The suppression of evidence does not go to the point of jurisdiction, and it would be dangerous to countenance the idea that a final decree of divorce, changing the status of the parties, can be reopened or questioned in this country when it could not be questioned in the court which granted the divorce. The result is that, in my opinion, the appeal fails.

Appeal dismissed.

Solicitors: *Ridsdale & Son, for James S. Smith, Liverpool; Sharpe, Parker, Pritchards, Barham, & Lawford, for Style, Lindsay, & Squarey, Liverpool.*

Note.—BATER v. BATER is a case which is interesting to American lawyers rather for the information it gives as to the attitude of English courts toward foreign divorces than for its enunciation of the principle that a divorce granted by a foreign court having jurisdiction of the subject-matter and the parties fixes the status of the parties in other jurisdictions, even if granted for a cause which would not have been sufficient in those jurisdictions. In the United States this principle is relatively unimportant for the reason that as under the "full faith and credit" clause of the Federal Constitution a divorce granted in one state by a court having jurisdiction of the subject-matter and the parties is valid in all other states, although granted upon grounds which would have been insufficient in such other states (see *Cheely* v. *Clayton* (1884) 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; *Harrison* v. *Harrison* (1851) 19 Ala. 499; *Thompson* v. *Thompson* (1856) 28 Ala. 12; *Standridge* v. *Standridge* (1860) 31 Ga. 223; *Tolen* v. *Tolen* (1831) 2 Blackf. 407, 21 Am. Dec. 742; *Harding* v. *Alden* (1832) 9 Me. 140, 23 Am. Dec. 549; *Hunt* v. *Hunt* (1878) 72 N. Y. 217, 28 Am. Rep. 129; *Jones* v. *Jones* (1888) 108 N. Y. 415, 2 Am. St. Rep. 447, 15 N. E. 707; *Dorsey* v. *Dorsey* (1838) 7 Watts, 349, 32 Am. Dec. 767; *Shreck* v. *Shreck* (1870) 32 Tex. 578, 5 Am. Rep. 251), its field of operation is limited to divorces granted in foreign countries. For instances of its application, see *Roth* v. *Roth* (1882) 104 Ill. 35, 44 Am. Rep. 81; *Leshinsky* v. *Leshinsky* (1893) 5 Misc. 495, 25 N. Y. Supp. 841; *Miller* v. *Miller* (1911) 70 Misc. 368, 128 N. Y. Supp.

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787; also *Wall* v. *Williamson* (1845) 8 Ala. 48, which recognizes the validity of a divorce of Indians according to their tribal law.

A possible limitation of the principle above stated may exist where a divorce is granted for a cause not sanctioned by the public policy of the forum.

The importance of BATER v. BATER lies in the fact that it effectually and finally disposes of a doctrine of English law, already undermined by *dicta*, known as the resolution in *Lolley's Case* (1812) Russ. & R. C. C. 237, 2 Clark & F. 567. This was that an English marriage could not be dissolved by a foreign divorce for grounds on which it was not liable to be so dissolved in England. This doctrine was followed in *M'Carthy* v. *Decaix* (1831) 2 Russ. & M. 620, 2 Clark & F. 568, note; *Re Wilson* (1865) L. R. 1 Eq. 247, 35 L. J. Ch. N. S. 243, 12 Jur. N. S. 132, 13 L. T. N. S. 576, 14 Week. Rep. 161; *Simonin* v. *Mallac* (1860) 2 Swabey & T. 67, 29 L. J. Prob. N. S. 97, 6 Jur. N. S. 561, 2 L. T. N. S. 327 (which was a case of a marriage celebrated in England between persons domiciled in France); *Briggs* v. *Briggs* (1880) 28 Week. Rep. 702, 5 P. D. 163, 49 L. J. Prob. N. S. 38 (in which, however, there was an express finding that the person who procured the foreign divorce was not domiciled in the country where it was granted); and see also *Tovey* v. *Lindsay* (1813) 1 Dow, P. C. 124, where Lord Eldon expressed a doubt whether an English marriage could be dissolved by a Scotch divorce.

This rule is said to have been a result of a conception of marriage as a contract, the conditions of which as to its rescission must be determined by the law under which such contract was entered into. But with the development of the theory that marriage, though in some respects a contractual relation, creates a status, came the view that such status may be put an end to by courts having jurisdiction of the subject-matter and the parties.

In *Warrender* v. *Warrender* (1834) 9 Bligh, N. R. 129, 2 Clark & F. 488, the House of Lords, upon appeal from a decision of the Scotch court of sessions, in a suit for divorce, held that a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being bona fide, and not collusively for the purposes of the suit, domiciled in Scotland, might be dissolved by a Scotch divorce. The Lord Chancellor said that it was not necessary to a decision of the case to impeach the authority of *Lolley's Case*, or of any other that may have been determined in England upon the authority of that case; that the decision in that case was merely to the effect that the courts of England would not recognize the validity of a Scotch divorce, and that that case did not involve the right of the Scotch court to grant a divorce, or its effect in Scotland. He, however, discussed the decision in the *Lolley Case* at considerable length, and intimated his disapproval of it.

In *Harvey* v. *Farnie* (1882) 8 App. Cas. 43, 52 L. J. Prob. N. S.

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33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308, 5 Eng. Rul. Cas. 703 (affirming 6 P. D. 45, 50 L. J. Prob. N. S. 17, 43 L. T. N. S. 737, 29 Week. Rep. 409, which affirmed 5 P. D. 153, 49 L. J. Prob. N. S. 33, 42 L. T. N. S. 482, 28 Week. Rep. 723), a Scotch divorce dissolving a marriage celebrated in England was upheld in England, the case being distinguished from *Lolley's Case* upon the ground that the phrase "English marriage," as used in that case, had reference not only to a marriage celebrated in England, but to a marriage between persons domiciled in England, whereas in the case at bar, while the woman was domiciled in England, the man was domiciled in Scotland, and the matrimonial domicil was established in the latter country. A similar distinction was made in *Maghee* v. *M'Allister* (1853) 3 Ir. Ch. Rep. 604; and *Turner* v. *Thompson* (1888) 36 Week. Rep. 702, 57 L. J. Prob. N. S. 40, 13 P. D. 37, 58 L. T. N. S. 387, 52 J. P. 151.

In *Shaw* v. *Gould* (1868) L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, Lords Chelmsford, Westbury, and Colonsay took occasion to repudiate the doctrine that an English marriage is indissoluble by the courts of another country where the parties have acquired a domicil, and expressed the opinion that *Lolley's Case* was no authority for such doctrine, but that the decisions in that case should be limited to the facts therein involved, and did not extend beyond the case where there was no bona fide domicil in the country where the divorce was rendered.

In *Le Sueur* v. *Le Sueur* (1876) 1 P. D. 139, 45 L. J. Prob. N. S. 73, 34 L. T. N. S. 511, 24 Week. Rep. 616, it was said that *Lolley's Case* cannot be pressed as an authority beyond the extent that the Scotch court has no power to dissolve an English marriage where the parties are not domiciled in Scotland, but have only gone there for such a time as would render them amenable to the jurisdiction of the Scotch court; that it did not decide, and that no other case has decided, that the law of England does not recognize the right or authority of any court, whether domestic or foreign, to dissolve an English marriage for any cause or for any pretext whatever.

In *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 72 L. T. N. S. 873, 11 Reports, 527, the court said that the doubt created by the opinions of the common-law judges in *Lolley's Case*, whether the principle of international law, according to which a decree of divorce dissolving the marriage of parties domiciled within the jurisdiction of the court ought to be respected by the tribunals of every civilized country, was consistent with the law of England, which at that time did not allow a marriage to be judicially dissolved, has since been dispelled, and that the rule is now settled that an English marriage between persons at that time domiciled in England may be dissolved by a decree of a court of a country in which the parties subsequently become bona fide domiciled.

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A divorce for adultery rendered by a court of Cape Colony, in Africa, dissolving a marriage contracted in Ireland, between persons then domiciled there, will be upheld as valid in England if the parties were domiciled in Cape Colony at the time the divorce was rendered. *Scott* v. *Atty. Gen.* (1886) 11 P. D. 128, 55 L. J. Prob. N. S. 57, 56 L. T. N. S. 924, 50 J. P. 824.

In this country it has been very generally held that the fact that the marriage was not celebrated at the forum, and the parties were not domiciled there at the time of the marriage, does not deprive the court of jurisdiction if one or both are domiciled there at the time of the suit (see *Cheever* v. *Wilson* (1869) 9 Wall. 108, 19 L. ed. 604; *Roth* v. *Roth* (1882) 104 Ill. 35, 44 Am. Rep. 81; *D'Auvilliers* v. *Her Husband* (1880) 32 La. Ann. 605; *Barber* v. *Root* (1813) 10 Mass. 260; *Harteau* v. *Harteau* (1833) 14 Pick. 181, 25 Am. Dec. 372; *Jones* v. *Jones* (1889) 67 Miss. 195, 19 Am. St. Rep. 299, 6 So. 712; *Ditson* v. *Ditson* (1856) 4 R. I. 87; *Hubbell* v. *Hubbell* (1854) 3 Wis. 662, 62 Am. Dec. 702); and there are in addition a large number of cases which proceed upon the assumption that the jurisdiction of the subject-matter is not defeated by the fact that the marriage was not celebrated at the forum. As said in *Shreck* v. *Shreck* (1870) 32 Tex. 578, 5 Am. Rep. 251, the contract of marriage, being *sui generis,* may be regarded as an exception to the universality of the rule that the law of the place where a contract is made governs in determining its construction, obligation, and enforcement. In South Carolina only, where no cause for divorce is recognized, has it been held that a marriage there celebrated is indissoluble in any other state. See *Hull* v. *Hull* (1848) 2 Strobh. Eq. 174 (where the court said that the *lex loci contractus* furnishes a just rule for the interpretation of the rights and obligations under the marriage contract as it does in the case of other contracts); and *Duke* v. *Fulmer* (1852) 5 Rich. Eq. 121. *Irby* v. *Wilson* (1836) 21 N. C. (1 Dev. & B. Eq.) 568, which has sometimes been supposed to support the doctrine of the South Carolina cases above referred to, in reality turns upon another point.

BATER v. BATER is also of interest as apparently holding that, in determining whether the court which granted a divorce had jurisdiction, the question of the domicil of the parties to the suit is governed by the law of the state in which the divorce was granted, although as it does not appear that the law of England differs from that of New York (where the divorce was granted) on this point, the decision is perhaps not wholly unequivocal.

In this connection, however, it may be recalled that it is settled law that a decree of divorce rendered in another state may be impeached on the ground of the lack of residence or domicil of the plaintiff at the divorce forum, notwithstanding the recitals of the

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jurisdictional facts in the decree. See notes in 59 L.R.A. 135, and 23 L.R.A.(N.S.) 1254.

The question whether a deserted wife may adopt a domicil acquired or retained by her husband for the purpose of enabling her to bring a suit for divorce is one upon which the courts of this country have differed. It is held, on the one hand, that the maxim that a wife's domicil follows her husband's cannot be invoked in her favor for the purpose of conferring jurisdiction of such a suit upon a court of a state in which the husband is domiciled, when she is actually a resident of another state (*Wood* v. *Wood* (1891) 54 Ark. 172, 15 S. W. 459; *Jenness* v. *Jenness* (1865) 24 Ind. 355, 87 Am. Dec. 335; *Pate* v. *Pate* (1878) 6 Mo. App. 49; *Schonwald* v. *Schonwald* (1856) 55 N. C. (2 Jones, Eq.) 367; *White* v. *White* (1893) 18 R. I. 292, 27 Atl. 506; *Dutcher* v. *Dutcher* (1876) 39 Wis. 651); on the other, it has been applied in cases where the wife had either not been in the state for the period required to obtain residence (*Kashaw* v. *Kashaw* (1853) 3 Cal. 312), or was actually residing elsewhere (*Dunlop* v. *Dunlop* (1881) 3 Ky. L. Rep. 20; *Masten* v. *Masten* (1844) 15 N. H. 159; *Payson* v. *Payson* (1857) 34 N. H. 518; *Sewall* v. *Sewall* (1877) 122 Mass. 156, 23 Am. Rep. 299; *Smith* v. *Smith* (1886) 19 Neb. 706, 28 N. W. 296).

In connection with BATER v. BATER it seems desirable to call attention to the case of *Armitage* v. *Atty. Gen.* [1906] P. 135, where it was held that the English courts will recognize the binding effect of a decree of divorce obtained in a state where the parties were not domiciled, if the courts of the state in which they were domiciled at the time recognize the validity of the decree. Sir J. Gorell Barnes, President, said: "The point then is: Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicil? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the state of New York—the state of the domicil—as having affected and determined it. That being so, Gillig and his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled at the date of the decree. It seems to me logically to follow that this court must recognize that state of dissolved union,—dissolved, that is, in one state and recognized as dissolved in the other state,—and that it must be recognized as dissolved all over the world."

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[PRIVY COUNCIL.]

WISE, *Appellant,*
and
PERPETUAL TRUSTEE COMPANY, LIMITED, *Respondents.*

[1903] A. C. 139.
Also Reported in 72 L. J. P. C. N. S. 31, 51 Week. Rep. 241, 87 L. T. N. S. 569, 19 Times L. R. 125.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Principle upon which clubs are founded — Liability of trustees of club in respect of leases — Liability of the members of a club.

The rule that trustees are entitled to be indemnified by their *cestuis que trust* against liabilities incurred by their holding trust property does not apply to cases where the nature of the transaction excludes it.

An ordinary club is formed upon the tacit understanding, judicially recognized, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules.

Trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on its behalf, are entitled to indemnity out of any property of the club to which their lien as trustees extends. Its members are not, by reason only of being *cestuis que trust*, personally liable to indemnify them, where there is no rule imposing such liability upon them.

(December 13, 1902.)

Present: Lord Macnaghten, Lord Lindley, Sir Ford North, Sir Arthur Wilson, and Sir John Bonser.

APPEAL from an order of the Supreme Full Court (July 23, 1900) affirming an order made by the Chief Judge in Equity (March 5, 1900).

The question involved in the appeal is whether the appellant, who was a member of a club in Sydney called the Cercle Français, is, in common with other members thereof, liable under the circumstances stated in their Lordships' judgment to indemnify the estate of William Henry Paling in respect of rent and other moneys and liabilities paid and incurred by the said Paling or his executors under a lease which he and others, as trustees for the said club, took of the club premises.

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The proceedings in the suit brought by the respondents to enforce the above liability are sufficiently detailed in the judgment [140] of their Lordships; and may also be read in N. S. L. R. 19 Eq. 177. The decree made therein on October 27, 1898, which was not appealed from, declared the basis of the liability to be enforced; namely, that those members who had assented to and ratified the taking of the lease were liable to indemnify the trustees. It then referred it to the master to report as to the amount necessary to be raised to meet it, and what persons were liable to contribute thereto. The appellant was thereupon served with a notice that, unless he objected by affidavit, his name would be settled on the list of contributories.

The master found that the appellant joined the club in July, 1886, and remained a member to the last, and after reviewing the evidence he came to the conclusion that his acts, taken in connection with the fact that he continued to remain a member, amounted to a ratification of the action of the trustees in taking the lease.

The Chief Judge affirmed the finding. He found that the appellant knew of the liabilities of the club, including the liability of the trustees under the lease, and encouraged members to carry on the club, in the hope that it would tide over its temporary difficulties, and that by the club carrying on till February, 1891, the trustees were encouraged to retain an onerous asset which otherwise they might have got rid of; and he was of opinion that that fact, coupled with the fact of the appellant remaining a member of the club and taking no steps to show that he in any way disapproved of the new premises being taken for the club, was sufficient to render the appellant liable to indemnify the trustees.

The full court affirmed this order. The Chief Justice and Cohen, J., found that the appellant must be taken to have known the premises he enjoyed as a club to be leasehold, and was put upon inquiry, and could have ascertained the terms of the lease and the extent of the liability of the trustees, and must be taken to know that so long as he remained a member he was bound in common with all other members to indemnify the trustees; that after the decree of October 27, 1898, the question as to whether membership alone was sufficient to impose liability on persons who were members at the date of [141] the meeting of

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January 13, 1888, was still open for consideration; that by the rules of the club the property of the club was made the property of the members, so that the lease, which might be a valuable asset, belonged to them, and they knew it was by the rules vested in the trustees upon trust for them; and that every circumstance in the case was such as to put the appellant upon inquiry as to the extent of their interest in the property of the club, and what the property was which the trustees held on their behalf; and they decided that the fact of membership on July 12, 1888, taken alone, and still more in connection with his subsequent conduct, was sufficient to impose liability upon all persons who were members of the club at the date of the winding up, and who had not been exonerated by the said decree.

Owen, J., who differed, did so on the ground that the appellant could not be held to have ratified the lease, and was not present at the meeting when the transaction of lease was decided on.

Scott Fox, K.C., and **Shearman**, for the appellant, contended that the certificate declaring him liable to indemnify the respondents should have been set aside. The appellant had always been willing to share with all the other members of the club the liabilities under the lease. But he objected to take upon himself an individual liability not shared by most of the members. The form of the suit and the declarations in the decree rendered only four or five persons liable to make good a sum which, with costs, amounted to over 5,000*l*. He contended that the evidence given of his acts did not amount, in law or in equity, to a ratification by him of the action of the trustees in taking the lease of the premises. Whatever he had done, he did in the belief that the statements contained in the circulars of June 9 and June 21, 1890, were true, whereas they contained misstatements of fact. Upon the general law as to the liability of members of clubs, and also of *cestuis que trust* for the acts of their trustees, see *Perpetual Trustee Co.* v. *A'Beckett* (1899) 19 New South Wales L. R. 176, 186 and cases there cited; *Ex parte Chippendale* (1854) 4 De G. M. & G. 19, 18 Jur. 710; *In re St.* [142] *James' Club* (1852) 2 De G. M. & G. 383, 16 Jur. 1075; *Minnitt* v. *Lord Talbot* (1876) Ir. L. R. 1 Eq. 143; S. C. Ir. L. R. 7 Eq. 407;

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Phosphate of Lime Co. v. *Green* (1871) L. R. 7 C. P. 43, 25 L. T. N. S. 636.

Haldane, K.C., and **C. James**, for the respondents, contended that the judgments of the courts below were right. The taking of a lease for club purposes was a necessary or reasonable act within the scope of the trust reposed in trustees of a club. Further than that, the meeting of January 13, 1888, by which the proceedings of the meeting of December 9, 1887, were confirmed, authorized the taking of the lease, and made it within the scope of the trust. The true inference to be drawn from the evidence is that the appellant assented to and ratified the action of the trustees in taking the lease, so far as any ratification was necessary. [**Lord Macnaghten.** Can members of a club be held liable to indemnify trustees in any action they may enter into, when there is no rule of the club to that effect? It is a liability not contemplated by them.] Reference was made to the circular of June 21, 1890. In the circumstances of this case the taking of the lease by the trustees, even without any specific authority from a general meeting, was within the scope of their trust. And the adoption or confirmation of the minutes of an invalid meeting ratified them. *In re Portuguese Consolidated Copper Mines, Limited* (1890) 45 Ch. D. 16, 63 L. T. N. S. 423, 39 Week. Rep. 25, 2 Meg. 249. Reference was made to the rules of the club to show that they contemplated the liability sought to be enforced.

The appellant's counsel were not heard in reply.

The judgment of their Lordships was delivered by

Lord Lindley: This appeal raises the extremely important question whether the members of an ordinary club are personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees, and where there is no rule imposing such liability.

The undisputed facts are shortly as follows:—

In the year 1886 certain persons, including a Mr. Paling, now deceased, formed a club in Sydney, New South Wales, [**143**] which was known as the Cercle Français. The appellant became a member of the club in July, 1886, and remained a member of the club until its dissolution. In January, 1887, the club adopted certain rules, the 12th and 17th of which were as follows:—

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"(12) The administration of the affairs of the club is intrusted to a committee elected at the first general meeting in each year. The duties of the members of the committee are purely honorary."

"(17) The committee disposes of the funds of the society, and has full power to take all measures for the internal management which it may deem necessary."

Between July and December, 1887, it was considered by some members of the club that the premises then occupied by the club at No. 50 Wynyard square were too small, and steps were taken to provide increased accommodation. A general meeting was called to consider the subject, and a meeting was held on December 9, 1887. Too few members attended to bind the club; but the subject of obtaining a lease of new premises of the club was discussed, and the members present resolved that the matter be left in the hands of M. Lachaume, the president of the club, to make the best arrangements in the interests of the club, and the said Lachaume and the said W. H. Paling and Messrs. Doublet and Van de Velde were appointed trustees of the club.

A general meeting of the club was held on January 13, 1888, at which the minutes of the meeting of December 9, 1887, were read and confirmed.

On July 12, 1888, the above-mentioned Messrs. Paling, Lachaume, Doublet, and Van de Velde became lessees of certain premises known as 50 Wynyard square and 9 Wynyard lane for a term of ten years from July 9, 1888, at a rental of 555*l.* per annum, and subject also to certain onerous covenants set out in the said lease. After the execution of this lease the above-mentioned premises were used for the purposes of the club, and the club remained in possession thereof until it was dissolved.

In July, 1888, after the execution of the lease, the old rules [**144**] of the club were repealed and new rules were adopted. The 3d, 4th, 14th, and 15th were as follows:—

"(3) The property of the club, subject to the liabilities thereof, shall belong to the members for the time being.

"(4) No member shall, by reason of his membership, have any transmissible or assignable interest, by operation of law or otherwise, in any of the property of the club. On any member ceasing, by death, resignation, or otherwise, to be such, all his in-

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terest shall survive, accrue, and belong to the other members for the time being."

"(14) The affairs of the club shall be under the management of the following office bearers; namely, a president, vice president, four trustees, a committee, and a treasurer.

"(15) All purchases, investments, leases, conveyances, securities, or contracts by, to, or on behalf of the club, shall be made, taken, or entered into in the names of the trustees. All the real and personal property of the club shall be vested in, and shall be held by them upon trust for, the members for the time being, and shall (except as to the real property) be subject to the disposition of the committee, whose order, certified in writing under the hand of the chairman of the day and attested by the secretary, shall be obligatory upon and a justification to the trustees as to making, taking, or entering into any such purchase, investment, lease, conveyance, security, or contract, or any disposal of any personal property vested in them as such trustees. And the orders of the committee, certified in like manner as to any purchases necessary for carrying on the internal management of the club, shall also be obligatory upon and a justification to the trustees for making the same. The real property of the club shall not be dealt with, except by the resolution of a general or special general meeting of the members of the club."

The rules prescribed the entrance fees and subscriptions, but there was no rule imposing any liability on any of the members to pay more.

The club continued to exist until February, 1891, when it was dissolved. It had eighty members when the lease was obtained, and ninety more joined afterwards.

[145] In April, 1891, the above-mentioned lessees sublet the premises comprised in the lease of July 12, 1888, to the Cosmopolitan Club Company for the unexpired portion of the ten years' term less one day, the underlessees covenanting to pay the same rent and perform the lessees' covenants. The Cosmopolitan Club Company remained in possession until January, 1894, and paid the rent up to that date, when they went into liquidation. The lessees then re-entered into possession of the premises, and from time to time relet them, giving the club the benefit of all rentals received. Finally all the trustees except the said William Henry

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Paling, being unable to pay the rent, the said Paling in his lifetime, and his executors (the respondents to this appeal) after his death, paid under the lessees' covenants various sums amounting in the aggregate to 2,350*l.* or thereabouts in excess of moneys received by them by subletting the premises.

On April 22, 1897, the executors of the said William Henry Paling, deceased, filed a statement of claim in an action in the Supreme Court of New South Wales in Equity against certain members of the club selected to represent them all, and the plaintiffs prayed as follows:—

"(1) That it may be declared that all persons who were members of the said Cercle Français on the 12th day of July, 1888, and all persons who became members of the same Cercle Français subsequent thereto, and the personal representatives of any of such persons respectively who are now deceased, became and are jointly and severally liable to contribute to and indemnify the plaintiffs and the estate of the said William Henry Paling against the rent paid and expenses incurred by the said William Henry Paling during his lifetime, and by the plaintiffs since his death, in respect of the said lease and the covenants thereof, and the future rent and expenses to which the plaintiffs, as executors of the said William Henry Paling, are or may become liable under the said lease and the covenants thereof, and that the defendants, and all such other persons and representatives as respectively aforesaid, may be jointly and severally decreed to repay to the plaintiffs and indemnify them against such rent and expenses, with interest on the [**146**] same at such rate as this Honorable Court shall direct, and also to pay the plaintiffs' costs of suit.

"(2) That an account be taken under the direction of this Honorable Court of the rent and expenses respectively aforesaid.

"(3) That an inquiry may be directed as to the persons constituting the said several classes of members, and whether any and which of such persons are dead; and, if so, who are their respective legal personal representatives."

The appellant was not a party to the said suit, nor was he served with notice of the said statement of claim nor of the proceedings therein. In the statement of claim the plaintiff set out the various classes of members which each defendant was to represent. They were as follows:—

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(i) a'Beckett as representing members of the committee at the time of the making of the lease.

(ii.) Fesq as representing members of the club present at the general meeting of January 13, 1888.

(iii.) Burne as representing members at the time when the lease was made, but who were not present at the meeting of January 13, 1888.

(iv.) Woolcott-Waley as representing members of the committee at a date subsequent to the lease being made.

(v.) Henderson as representing the members of the club elected at a date subsequent to the date of the lease.

On May 25, 1897, Manning, Chief Judge in Equity, made an order authorizing the above-mentioned defendants to defend the proceedings respectively on behalf of the above-specified classes. The appellant was not served with, and was no party to, the said order.

On October 27, 1898, Simpson, Chief Judge in Equity, made a decree dismissing the suit against the defendants Woolcott-Waley and Henderson, with costs, and declaring (*inter alia*) that the defendants a'Beckett, Fesq, and Burne, and all other persons who were members on July 12, 1888, and who assented to or subsequently ratified the action of the trustees of the club in taking the lease of that date, are and each of them is bound to indemnify the late William Henry Paling and his estate against [**147**] the rent and other moneys paid by the said William Henry Paling or his executors under the said lease. By the said order it was further decided that the Master in Equity should inquire as to which persons were liable to contribute on the basis of the above decree.

On August 5, 1899, the defendants gave notice to the appellant that the Master in Equity was proceeding to settle the said list, and that the appellant's name had been submitted to the master for inclusion therein.

On August 25, 1899, the appellant filed an affidavit objecting to his inclusion in the said list, and on November 21, 1899, the appellant filed a notice of further objections.

In November, 1899, evidence was taken upon the said matter, and the master found that the appellant had assented to or ratified the action of the trustees in taking the lease, and that he

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ought to indemnify the plaintiffs, with costs to be taxed; and on December 15, 1899, the master made a separate certificate to that effect. On February 15, 1900, the appellant took out a summons to vary the master's certificate. The said summons was heard by the Chief Judge in Equity; and on March 5, 1900, the said summons was dismissed, with costs.

On March 19, 1900, the appellant filed a notice of appeal against the said order to the full court; and on July 23, 1900, the said appeal was dismissed, with costs.

The present appeal is from these last orders. There is no appeal from the decree of October 27, 1898. In the case lodged by the appellant he stated, and his counsel repeated before their Lordships, that the appellant was always willing to share with all the other members of the club the liabilities under the said lease, but as the form of the suit and the declarations in the decree rendered only four or five persons liable to make good a sum which (by the addition of costs) amounted to over 5,000*l.*, he objected and objects to take upon himself an individual liability not shared by other members of the club.

The decree of October 27, 1898, was not made upon the broad ground that the members of the club as *cestuis que trust* were bound to indemnify their trustees; it was made upon the theory that only those members of the club were [**148**] liable to indemnify the plaintiffs who had assented to or ratified the taking of the lease; and the master's certificate found that the appellant had assented to and ratified it. The Chief Judge refused to vary the certificate, thinking it right. The full court, on appeal, affirmed the decision, but not unanimously, nor on the same grounds. The Chief Justice considered it proved that the appellant had become one of the *cestuis que trust* of the lease, and was, therefore, liable to indemnify the plaintiffs. Cohen, J., considered that the appellant had assented to and ratified the taking of the lease, and had, therefore, become liable. Owen, J., differed. He thought the master's certificate wrong, and that the appellant ought to succeed.

With respect to the appellant's assent or ratification to the taking of the lease, much discussion took place as to what was meant in this case by ratification, and it was contended that no ratification, as distinguished from approval, could be estab-

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lished. It is not, however, necessary to do more than to say that it became plain to their Lordships when the evidence had been examined that, although there was ample evidence to prove that the appellant knew that a lease had been taken for the club, and that the club had the use of the property, and that the lease might become a burden to the club, yet that the appellant had done nothing whatever to incur any liability to indemnify the trustees, unless such liability attached to him as a member of the club and as one of the *cestuis que trust* of the lessees. It further appeared to their Lordships to be proved that, notwithstanding the irregularities of the meeting of December, 1887, and the doubts thrown on the legal validity of its subsequent confirmation, yet that the members of the club generally and the appellant with the others, through the committee of management and otherwise, so far assented to what had been done as to have become *cestuis que trust* of the lessees. Their Lordships were satisfied that the relation of trustee and *cestui que trust* had been created. It follows from this that the lessees as trustees were entitled to be indemnified out of any property of the club to which their lien as trustees extended. But the evidence against the appellant did not [**149**] prove anything more than the existence of the above relation; and their Lordships intimated that in their opinion the real question for decision was whether the appellant was liable to indemnify the trustees under the circumstances thus proved. This view was ultimately accepted by counsel, and their Lordships do not, therefore, think it necessary to allude further to the evidence on the present occasion.

In *Hardoon* v. *Belilios* [1901] A. C. 118, 70 L. J. P. C. N. S. 9, 49 Week. Rep. 209, 83 L. T. N. S. 573, 17 Times L. R. 126, this board had to consider the right of trustees to be indemnified by their *cestuis que trust* against liabilities incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognized as well established in the simple case of a trustee and an adult *cestui que trust*. But, as was then pointed out, this principle by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not

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partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognized. It has been so recognized in actions by creditors and in winding-up proceedings. See *Flemyng* v. *Hector* (1836) 2 Mees. & W. 172, 2 Gale, 180, 6 L. J. Exch. N. S. 43; *St. James' Club* (1852) 2 De G. M. & G. 383, 16 Jur. 1075.

Apart from an observation of Lord St. Leonards in the last case, and which observation is in favor of the appellant, the only reported case in which a court has had to consider the application to a club of this right to indemnity is *Minnitt* v. *Lord Talbot* (1881) Ir. L. R. 7 Eq. 407. In that case some members of a club, who had guaranteed the repayment of money borrowed for the club, sought indemnity, not only out of the property of the club, but from the members personally. The court, which had already [**150**] given effect to their lien (L. R. Ir. 1 Ch. 143), afterwards made an additional order and inquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what were the grounds on which any member was held to have incurred liability, nor, indeed, whether any member had incurred such liability. This case does not, therefore, assist their Lordships on the present occasion.

The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon* v. *Belilios, supra,* is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trust* have become such shall be completely ignored.

The appellant in this case is not, in their Lordships' opinion, under any legal or equitable obligation to pay or contribute

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anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavor to obtain more is to be regretted, and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favor would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.

Their Lordships will, therefore, humbly advise His Majesty to set aside the certificate of the master, and to reverse the orders of March 5, 1900, and July 23, 1900, with costs.

The respondents will pay the costs of the appeal.

Solicitor for appellant: *George Slade.*

Solicitors for respondents: *Kimbers & Boatman.*

Note.—Right of trustees or executive committee of club to indemnity for obligations incurred by them.

A search has failed to reveal the existence of any other decision dealing with the question above stated, other than the *dictum* of Lord St. Leonards in *Re St. James's Club* (1852) 2 De G. M. & G. 383, 16 Jur. 1075, referred to in WISE v. PERPETUAL TRUSTEE CO., that members of a club are not liable *inter se* except to the extent to which they have agreed to be so.

But the trustees or executive committee are entitled to a lien or charge on the club property to the extent to which they have expended their own money in improving and furnishing the clubhouse. *Minnitt* v. *Talbot* (1876) Ir. L. R. 1 Eq. 143, s. c. on final decree Ir. L. R. 7 Eq. 407.

There may, however, be a liability to contribute where the member might have been held directly liable for the debt; as, where he authorized or ratified its incurment. See *Mountcashell* v. *Barber* (1853) 14 C. B. 53, 2 C. L. R. 60, 23 L. J. C. P. N. S. 43, 2 Week. Rep. 96; *Pears* v. *Stormont* (1911) 24 Ont. L. Rep. 508 (*dictum.*)

As social clubs are ordinarily constituted, their members are not to be considered partners, and the pecuniary liability of a member is limited to the dues or assessments which he has agreed to pay. (See *Flemyng* v. *Hector* (1836) 2 Mees. & W. 172, 2 Gale, 180, 6 L. J. Ex. Ch. N. S. 43; *Richmond* v. *Judy* (1879) 6 Mo. App. 465; *Meriweather* v. *Atkin* (1909) 137 Mo. App. 32, 119 S. W. 36. *Contra, Park* v. *Spaulding* (1877) 10 Hun, 128 in which it is said that where a body of gentlemen join themselves together for social inter-

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course and pleasure, and assume a name under which they commence to incur liabilities, by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wish to avoid his personal liability by withdrawal from the body, it is his duty to notify the creditors of such withdrawal; otherwise, if a creditor continues to furnish, in good faith, articles such as have been previously purchased for the use of the club, his responsibility will continue upon the same principle that holds retiring partners to liability for an indebtedness subsequently contracted with former creditors.) No member of a club is liable to a creditor except so far as he has assented to the contract in respect to which such liability has arisen (see *Re St. James's Club* (1852) 2 De G. M. & G. 383, 16 Jur. 1075; *Overton* v. *Hewett* (1886) 3 Times L. R. 246; *Steele* v. *Gourley* (1887) 3 Times L. R. 772); and a committee appointed to manage the affairs of a club the constitution of which contemplates the discharge of obligations as they arise, from funds in hand, have no authority to pledge the creditor of the members for work done or goods supplied for the use of the club. See *Flemying* v. *Hector* (1836) 2 Mees. & W. 172, 2 Gale, 180, 6 L. J. Exch. N. S. 43.

The relation of the member to the club is contractual, the articles of association or by-laws constituting the terms of the agreement (*Anderson* v. *Amidon* [1911] 114 Minn. 202, 34 L.R.A.(N.S.) 647, 130 N. W. 1002, Ann. Cas. 1912B, 987); and he is liable only for such dues or assessments as are provided for by the constitution and rules of the club. [For note on "Enforceability of dues of members of social club," see 34 L.R.A.(N.S.) 647.] In the absence of any provision in the constitution or by-laws providing that a member may be assessed for the debts of the club, it cannot levy an assessment upon its members in order to pay off its outstanding obligations. *Duluth Club* v. *MacDonald* (1898) 74 Minn. 254, 73 Am. St. Rep. 344, 76 N. W. 1128. E. S. O.

[HOUSE OF LORDS.]

ATTORNEY GENERAL (AT THE RELATION OF MAYOR, ETC., OF BIRKENHEAD) and Others, *Appellants*,

and

MERSEY RAILWAY COMPANY, *Respondents*.

[1907] A. C. 415.

Also Reported in 76 L. J. Ch. N. S. 568, 71 J. P. 448, 97 L. T. N. S. 524, 23 Times L. R. 684.

Railway company — Omnibus business — Incidental powers — Ultra vires.

A railway company without express power to run omnibuses ran

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omnibuses in a way which was in this House held as a matter of fact to be not incidental to or consequential upon their statutory powers:—

Held, that the company must be restrained from carrying on the omnibus business, and that the undertaking required and sanctioned by the Court of Appeal was impracticable.

Decision of the Court of Appeal [1907] 1 Ch. 81, 76 L. J. Ch. N. S. 121, 71 J. P. 105, 96 L. T. N. S. 100, 23 Times L. R. 129, 178, reversed.[1]

Decision of Warrington, J. [1906] 1 Ch. 811, 4 Ann. Cas. 906, restored.[1]

(July 9, 1907.)

THE respondents established a system of omnibuses in connection with their railway in a manner which is fully described in the reports of the decisions below and indicated in the judgments of this House. Warrington, J., granted an injunction to restrain the company, and this decision was reversed by the Court of Appeal, the company giving an undertaking as to the mode of carrying on the omnibus business.

Cripps, K.C., and **Leslie Scott**, for appellants.
Upjohn, K.C., and **A. B. Shaw**, for respondents.

Lord Loreburn, L.C.: My Lords, in this case the question is whether a railway company is entitled to run a number of omnibuses which it says are incidental to the railway enterprise itself. The rule of law has been laid down in this House (see *London County Council* v. *Attorney General* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, and cases there cited) to the effect that it must be shown that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers; and it is a question in each case whether it is so or whether it is not so. In the present instance I do not think that this business of running an [416] ominbus system can be regarded as fairly incidental to or consequential upon this statutory enterprise. It seems to me that in substance it was an undertaking for the purpose of enabling the railway company successfully to compete with a ferry which belonged to others.

It is unnecessary to elaborate the distinctions between this and

[1] For opinions in these courts, see post, pp 770 et seq.

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other cases that have been quoted, because I do not believe that much assistance is derived by reasoning from analogy when the question at issue is in substance either a question of fact or at least a mixed question of fact and law. I agree with the judgment given by Warrington, J., who granted an injunction. The Court of Appeal have limited the injunction, or, what is the same thing, have refused the injunction, but required an undertaking. In my view that undertaking is one which could not be carried out in a business sense; and I think it involves the admission that, under restrictions such as are included in the undertaking, this business would be *intra vires*. I am of opinion that the order appealed from should be reversed.

Lord Ashbourne: My Lords, I quite agree with the judgment of the Lord Chancellor.

Lord Macnaghten: My Lords, I am of the same opinion.

It seems to me that the order which has been discharged by the Court of Appeal must be restored. I think that the judgment of Warrington, J., was perfectly right, and that no other order was possible. I have some difficulty in following the train of reasoning which led two learned judges of the Court of Appeal to replace it by an illusory undertaking, while they both admitted, if I understand their views aright, that what the respondents were actually doing when the Attorney General intervened, and what they claimed the right to do, was in contravention of the principles laid down in this House.

As regards the judgment of the learned Lord Justice who thought the action ought to have been dismissed, I most respectfully dissent from it. It seems to me that the illustrations which his Lordship gives, if I may say so with all deference, are somewhat wide of the mark, and they are perhaps open to this [417] further objection, that they are not required if the question proposed in his judgment is to be accepted as the test question in the case. The question there formulated is this: "Are the defendants really running the omnibuses here in question for the purpose of their railway, and so as to obtain and give facilities for better traffic over their line, or is the omnibus business really an independent business, in which they look substantially

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to general street traffic?" [1907] 1 Ch. 104, 76 L. J. Ch. N. S. 121, 71 J. P. 105, 96 L. T. N. S. 100, 23 Times L. R. 129, 178. That, I venture to think, is not the question at all. The question is this: Is the business of omnibus proprietors as the defendants were carrying it on when the action was brought reasonably incidental to their business as authorized by their special act? The principle to be applied is perfectly clear. The difficulty is all in the application. Hundreds of cases may be suggested where the thing done comes very near the line and may fairly be open to a difference of opinion. Speaking for myself, I cannot see what is to be gained by discussing such cases, real or imaginary, however interesting the discussion may be. Here, I think, the respondents have transgressed the line. It may be that in doing what they wish to do they cannot help it. But that, in my opinion, is no justification for their action. If they wish to extend their undertaking beyond the limits authorized by their charter, the proper course is to apply to Parliament for further powers. In my opinion a matter of this sort is much better left to Parliament. There everybody who has a right to be heard will be listened to, and there the interests of the public will be protected. I venture to think that the court may place itself in a ridiculous position if it attempts to regulate a commercial enterprise by impossible conditions and elastic and unsubstantial undertakings.

I am of opinion that the order of Warrington, J., ought to be restored with costs here and in the Court of Appeal.

Lord James of Hereford: My Lords, I desire to add a few observations. It seems to me that we have to look at the state of circumstances that existed upon December 23, 1905, when the relators instituted this action, and to determine [418] whether at that time the allegation which was made that the defendants carried on the business of omnibus proprietors and ran, plied for hire, or worked the omnibuses for the purpose of carrying passengers in the streets of Birkenhead, was or was not proved. Whatever has occurred since by way of modification of the business, I do not think ought to govern this case at all, and therefore the terms made in the Court of Appeal cannot now be regarded as controlling this action. If by those modifications

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the defendants have brought themselves within their powers, they needed no undertaking, they wanted no authority; they would raise no cause of action. If they have not done so, they have only maintained the state of things that existed in the month of December, 1905.

Now, my Lords, I am rather anxious to say that I do not think it is the intention of your Lordships in any way to prevent railway companies considering the convenience of their customers, the persons whom they are carrying. No doubt there are certain things incidental to the carriage of passengers which can be done. Of these perhaps that which is most attractive would be the giving of refreshments on the line. That is not, I presume, authorized in express terms by the statutes, but that is incidental to the carriage of passengers. In the same way the meeting of passengers or delivering them at their places of abode, where they wish to go, by an omnibus, may well be carried on without exceeding the statutory powers. But, My Lords, in this case that was not what existed at the time this action was brought. Here, as we see if reference be made to the plan which has been called the "Star" plan, it is proved that the course of the omnibus was to cling, as it were, to the tramways as competitors with the tramways, and to take passengers by these omnibuses who would otherwise have gone by the Birkenhead tramways. It was not confined to dealing with the passengers on the railway; it was an open omnibus business, picking up wherever they could find passengers for the profit of the omnibuses, and not for the convenience of the railway passengers.

Therefore, my Lords, it seems to me that this case is taken outisde of all those cases that have been mentioned where, [419] incidental to the business of the railway company or any other company, business was carried on that was not specially mentioned in the statutory powers, and that this was an independent business that was attempted to be carried on by this company.

My Lords, the danger of accepting the argument of the defendants is, that the natural consequence would be to give a railway company power to carry on a business as a railway company which they never had power to carry on, because, if bringing passengers as feeders to a railway is incidental to that railway company's business, it would not be confined to bringing

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them by omnibuses; you may bring them by tramways or by tramcars, or by cars moved by locomotive steam power; and that would be simply an extension of the railway. If the railway company could overcome the difficulty of taking land without compulsory powers, if they could take land by agreement, they would be able to bring into existence new railways not authorized by statute, and, I presume, be entitled to impose their own terms and tolls, unregulated by legislative control, if they thought fit. That would be a principle which your Lordships would be very slow to sanction or approve. And I think if the course which my noble and learned friend on the woolsack has moved should be taken is not taken, the result would be to extend the power of railway companies in a most dangerous manner.

Lord Atkinson: My Lords, I concur. I think the system of omnibus traffic which was in existence at the time this suit was instituted was not reasonably incidental to the carrying out of the undertaking which the railway company was authorized by statute to carry out.

I must say for myself that if the principles which have been relied upon in favor of this practice were to be generally applied, it would seem to me to dispense altogether with the necessity of getting statutory powers for enterprises which should be established in competition with those for which statutory powers had been obtained, provided the former ultimately brought passengers to the station of the railway company. I do not think such projects were ever intended to be protected as [**420**] incidental to the business of a railway company authorized by statute to carry on railway transit, and therefore think they are *ultra vires.*

Order of the Court of Appeal reversed and judgment of Warrington, J., restored, with costs here and in the Court of Appeal: Cause remitted to the Chancery Division.

Lords' Journals, July 9, 1907.

Solicitors: *F. Venn & Co., for Alfred Gill, Birkenhead; Cutler A. Jones.*

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In view of the references made throughout the decision above reported to the opinions rendered in the courts below, it seems desirable to publish them in connection therewith.

That rendered in the Divisional Court ([1906] 1 Ch. 811) by Warrington, J., is as follows:

Warrington, J. (after stating the facts): With regard to the law both sides are agreed as to the principle which is to be applied to this case. The only difficulty arises in the application of it. The principle is stated by the Lord Chancellor (Lord Selborne, L.C., in *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 478, 22 Eng. Rul. Cas. 114. He says this: "I assume that your Lordships will not now recede from anything that was determined in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 2 Eng. Rul. Cas. 304. It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with James, L.J., that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." What, therefore, I have to determine is whether what the railway company are doing in this case may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized; namely, the construction and use of their railway. It is admitted on both sides that the question whether an omnibus service may be maintained by a railway company for the distribution and collection of its passengers has never been the subject of judicial decision. Mr. Neville, for the railway company, referred to an old case—*South Wales Ry. Co.* v. *Redmond* (1861) 9 Week. Rep. 806, 10 C. B. N. S. 675, 4 L. T. N. S. 619—in which there is a *dictum* of Willes, J., to the effect that in his opinion it would not be *ultra vires* for a [816] railway company to provide for an omnibus service. But that *dictum* must be taken in connection with the case in which it was used, and I think it is absolutely accurate to say that there is no case in which this subject has been matter for judicial decision, or even for a *dictum* which can be regarded as actually in point.

The Attorney General and the corporation rely mainly on *Attorney-General* v. *London County Council* [1901] 1 Ch. 781, 70 L. J. Ch. N. S. 367, 84 L. T. N. S. 245, 17 Times L. R. 349 [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, in which it was decided that the London County Council were not authorized in connection with their tramway service in maintaining a service of omnibuses. It was said by the plaintiff that that case bound the present. It was said, on the other hand, by the railway company that there was not sufficient analogy between the business of a railway company and that of a tramway company to require the court to apply the principles expressed in that case to the present; and I think myself that the question which I really have to determine is whether *Attorney-General* v. *London County Council*, *supra*, is an authority which ought to apply to this case.

Now, before I come to that, it is necessary to consider the further argument which was addressed to me on behalf of the railway company, which

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is this, that it is undoubted that ever since railways in the development of their history became common carriers of goods they have, and have properly, collected merchandise for carriage on their railways, and distributed it after carriage on their railways. As to that there is no question, and cases have been cited for the purpose of establishing that that practice is recognized by the courts as being a legal practice authorized by the ordinary railway acts. That is undoubtedly so, but I do not think that the principle applicable to those cases applies to the case of passengers. When the cases in which the practice of railway companies in that respect is dealt with are looked at it will, I think, be found that there are only *dicta*, because the actual decisions are on the authority of railway companies to charge for extra services. The courts in the particular cases before them were dealing with railway companies having statutes containing clauses which referred to charges for [817] collection and distribution of goods; thereby recognizing that it was one of the things which a railway company could do and for which it could make charges. But I have had my attention called to no such provision in any act of Parliament with regard to passengers. It comes back, then, to this: Is the distribution and collection of its passengers fairly incidental to or consequential upon the business of a railway company?

I must not forget that I have had it in evidence that it is the practice, and has for years been the practice, of certain railway companies—for example, the London & Northwestern Railway Company in connection with its station at Euston—to provide private omnibuses for the collection and distribution of its passengers, and to also provide public omnibuses which run from Euston to Charing Cross and Waterloo, and other places in the south of London. On the other hand, certain railway companies have thought it desirable to obtain, and have obtained from Parliament, special powers authorizing them to organize and carry on an omnibus service. I think of the former class the Northwestern is the strongest case. I have had a representative of the company here before me, and he has shown me time-tables relating to their services. There are a number of omnibus services organized and carried on by the company, and, as he has told me, without any special statutory authority and without any objection. But really those facts have, I think, very little effect upon the decision which I ought to give, except this, that they do show that in the minds of persons employed in and acquainted with the business of railway companies the distribution and collection of passengers is regarded as being incidental to the business of a railway company.

Now I come, I think necessarily, to the case of *Attorney-General* v. *London County Council* [1901] 1 Ch. 781, 70 L. J. Ch. N. S. 367, 84 L. T. N. S. 245, 17 Times L. R. 309, and I have to see whether the principles of that case are or are not applicable to the present. In that case the position was this: There were certain tramways owned by a tramway company. There were three termini on the south side of the river Thames—at Blackfriars bridge, at Westminster bridge, and at Waterloo bridge. The [818] tramway company, having originally a memorandum of association which authorized them to use and work the tramways only, had, under the companies (memorandum of association) act of 1890, obtained powers to organize and carry on an omnibus service, and they had three omnibus services connecting their

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termini on the south side of the river with places on the north side of the river. The London County Council had power to purchase, and did purchase, the tramway undertaking of the tramway company. The statutory powers which they had were contained in § 2 of the London county tramways act 1896, which was as follows: "It shall be lawful for the council to exercise with respect to any tramways authorized by the local acts mentioned in the schedule to this act which have been or shall be purchased or acquired by them under their statutory powers the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways, and the council may provide place and run carriages thereon, and provide such horses, cars, fixed and movable plant harness and apparatus as may be requisite or convenient for enabling the council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them." In purchasing the tramway undertaking the London County Council and the vendors, the parties to the agreement, excluded the good will of the omnibus business. After the purchase of the tramways, the London County Council instituted, and, until restrained by the injunction which was granted in that case, carried on an omnibus business slightly different from that which had been carried on by the tramway company, inasmuch as they not only ran from the south side of the river to places on the north side of the river and back, but they ran their omnibuses along the Strand. Now the question in that case was really the general question whether the business of omnibus proprietors was a business incidental to the business of tramway proprietors. Cozens-Hardy, J., whose judgment was accepted by the House of Lords, begins his judgment by citing, not the passage from Lord Selborne's judgment which I have read, but a passage from the speech of Lord [819] Blackburn in the same case—*Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 49 L. J. Ch. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 44 J. P. 648, 22 Eng. Rul. Cas. 114—which is substantially to the same effect as the passage in Lord Selborne's speech. After stating the facts Cozens-Hardy, J., says this [1901] 1 Ch. 790: "The tramways which alone the county council were empowered to purchase have certain definite limits at the southern and northern ends. Within those termini the county council may, in the language of the section, 'work' the tramways and convey passengers in tram-cars. There are many things fairly incidental to this which they may do, and, indeed, must do. They may have stables and sheds for their horses and cars, they may have carts and horses to convey forage to their stables. In short, anything reasonably proper for the 'working' of the tramways is within their powers. Anything not falling within this definition is outside their powers. It seems to me that the London County Council are really carrying on a separate and distinct business as omnibus proprietors. They do not, and they cannot lawfully, convey in their omnibuses only passengers from and to their tramways. By the act of 1843, for regulating hackney and stage carriages in and near London, they are bound to take any passenger who desires a ride and is willing to pay a halfpenny, provided there is a vacant seat. The running of omnibuses in the streets of London is certainly not expressly authorized by the act of 1896, and, in my opinion, it is not impliedly authorized. It is not for

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me to consider whether the business of omnibus proprietors is one which may conveniently or advantageously be combined with the business of working the tramways." So, here in this case it is not for me to consider whether the business of omnibus proprietors may be conveniently or advantageously combined with the business of the Mersey Railway. That I assume. Now I think it is clear from that judgment of Cozens-Hardy, J., that he does not rest his judgment on the fact that the tramway company were carrying on two distinct businesses, one authorized by their original memorandum, the other authorized by the amended memorandum. I think he is dealing with it exactly as if the tramway company had been itself doing that which this railway [820] company were doing, namely, carrying on the business of omnibus proprietors on the supposition that it was incidental to their business as tramway proprietors.

In the House of Lords that judgment, having been first affirmed in the Court of Appeal, again came up for consideration, and for the purpose of the present case I will first refer to the speech of Lord Macnaghten. He said this [1902] A. C. 169: "The London County Council are carrying on two businesses"—exactly the words used by Cozens-Hardy, J.—"The business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a seaport."

I now go back to Lord Halsbury's speech, and I begin at the end of it to show what was actually in his mind in the words which he used at the beginning, to which I shall come presently. He said at the end [1902] A. C. 169: "I do not think it necessary to go through this case, because the very elaborate and careful judgments delivered both by Cozens-Hardy, J., and by the three learned Lords Justices in the Court of Appeal appear to me to exhaust the whole question." Now I go back to what he says at the beginning, because it was on this that Mr. Neville mainly rested his contention that the London County Council case is not applicable to the present. He begins by referring to the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 2 Eng. Rul. Cas. 304, and *Attorney-General* v. *Great Eastern Ry. Co. supra.* Then he says this [1902] A. C. 167: "So far as the particular questions before us here are concerned, depending as they do upon the statute itself, with the utmost respect for the learned counsel, I think the contentions hardly admit of plausible statement. The power which is expressly given to the London County Council excludes from [821] them, and to my mind is intended to exclude from them, that which did exist as a separate business under the earlier statute, and which was not intended, and obviously was not intended, to be conferred upon the London County Council. It appears to me to be, as I say, hardly susceptible of plausible statement to suggest that those words can possibly include this separate business. The only argument which, as it appears to me, is capable of plausible statement in the matter is the argument derived from the somewhat clumsy phrase used

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in the statute with reference to their being in the same position as the council of a borough divided into wards." That is, of course, not material to the present case. Now, it is quite true that Lord Halsbury was, in the view he took, mainly affected by the form taken by the statute of 1896. But having regard to his express approval of the judgment of Cozens-Hardy, J., I think the true inference from his judgment is that though he considered that the form of the statute of 1896 was sufficient to enable him to decide the case, and was the strongest point against the London County Council, it is clear that he did not disagree with the more general statement made by Cozens-Hardy, J., and by Lord Macnaghten. It seems to me, therefore, that I must adopt that case as decisive of the question whether a tramway company is or is not, by the power to maintain and work a tramway, authorized to maintain and work an omnibus service.

But that, of course, does not exhaust the question. I have then to consider whether this decision, in reference to a tramway company, applies to a railway company. Mf. Neville has said that it does not. He says there is this main distinction, which is of course true, between a railway company and a tramway company, that a tramway company is, in its origin at all events, for internal communications within a particular town, while a railway company is organized, and a railway is constructed, for the purpose of conveying passengers from one place to another, and from and to intermediate stations on that line. And he says that that distinction is most material for this reason, that it certainly would be an extraordinary thing that a tramway company authorized to construct and use the tramway between certain points in a particular town—that is, to maintain a [822] particular form of omnibus service in a particular town—should be at liberty, without further authority, to extend its services by means of another kind of omnibus—namely, an omnibus not run on tram lines—to a position outside those points. I fully feel the force of that remark; but I cannot bring myself to think that it really establishes the point which he tried to establish, namely, that the principle stated by Cozens-Hardy, J., and by Lord Macnaghten in *Attorney-General* v. *London County Council* [1901] 1 Ch. 781, 70 L. J. Ch. N. S. 367, 84 L. T. N. S. 245, 17 Times L. R. 349 [1902] A. C. 169, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, did not apply to the case of a railway. I have tried hard to see how far it really could be said to be incidental to or consequential upon the conveyance of passengers from one place to another on the railway to convey those passengers to another place away from the railway. If it is incidental to the business of a railway company to convey passengers by omnibus, we will say from the Central station on the Mersey railway to the Oxton district in Birkenhead, I cannot see where the limit of place is to be drawn, or why it should not be, as Lord Macnaghten says in the House of Lords, incidental to the business of a railway company having a seaport to convey its passengers to their destination over the sea. In principle and logically there seems to me to be no distinction between the two. In either case the passenger who has been conveyed upon the railway wants to go to a destination which is outside the railway, and it seems to me it can make no difference whether he is to be conveyed to that destination by means, as in the present case, of a motor omnibus, or whether he is to be conveyed to that destination by a steamship.

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There is one other case which I ought, perhaps, to refer to: *Attorney-General* v. *Manchester Corporation*, 22 Times L. R. 261 (since reported [1906] 1 Ch. 643, 75 L. J. Ch. N. S. 330, 70 J. P. 201, 54 Week. Rep. 307, 4 L. G. R. 365). In that case Farwell, J., held that the corporation of Manchester, in connection with their tramway undertaking, were authorized to collect and deliver parcels strictly in connection with their tramway undertaking. No doubt he did, but I think when his judgment is looked at it will be seen clearly that he rested it on the strict analogy between a railway company and a tramway company in reference to the conveyance of merchandise. It does not govern [823] the case of the collection and distribution of passengers, and is in fact entirely distinct from it. So far as it is an authority at all in the present case, I think it is an authority on the point which I have just been discussing, namely, the question whether the undertaking of a tramway company is, for such a purpose as this, analogous to that of a railway company, and so far it is an authority in favor of the plaintiffs.

On the whole I think—though I confess with some reluctance—I must come to the conclusion that the business of omnibus proprietors, such as that which is being carried on by the Mersey Railway Company, is not incidental to or consequential upon the authority given to them to maintain and use a railway, and accordingly the plaintiffs are entitled to succeed.

The following opinions were rendered in the Court of Appeal ([1907] 1 Ch. 81):

[87] **Vaughan Williams**, L.J.: Lord Halsbury begins his judgment in *London County Council* v. *Attorney-General* [1902] A. C. 165, 167, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, by saying: "It appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ch. N. S. 185, 2 Eng. Rul. Cas. 304 and *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 44 L. J. Ch. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 44 J. P. 648, 22 Eng. Rul. Cas. 114, and I do not think that much would be gained by going through each individual topic of it, because I think now it cannot be doubted that those two cases do constitute the law upon this subject. It is impossible to go behind those two cases; they are now part of the law of this country, and we must acquiesce in them, whether we like them or not." I certainly do not like the application of this part of the law to the present case. No [88] one will, in my opinion, be hurt by the running of these motor omnibus carriages for the convenience of those who have traveled or propose to travel as passengers by the railway which runs under the Mersey, nor is public convenience interfered with because these motor carriages carry passengers who are traveling for intermediate distances on their route to and from the railway station. It is difficult also to avoid the conclusion that the corporation of Birkenhead, who have set the Attorney General in motion in this case, have been actuated rather by a desire to gain an advantage over a company which is competing with the municipal trading of the corporation than by any sense of pub-

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lic convenience or public welfare. Still, the law must be applied as it is constituted by prior decisions. *Ashbury Railway Carriage and Iron Co.* v. *Riche, supra*, certainly does decide that a corporation must show something within the four corners of the act of Parliament under which they are created to justify the assumption of the power which they claim to exercise, and the case of *London County Council* v. *Attorney-General* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, decided, affirming the decision of the Court of Appeal [1901] 1 Ch. 781, 70 L. J. Ch. N. S. 367, 84 L. T. N. S. 245, 17 Times L. R. 349, that the London county tramways act 1896, which authorized the London County Council to purchase and work tramways, and to provide, place, and run carriages thereon, and to provide such horses, cars, fixed and movable plant, harness, and apparatus as might be useful and convenient for working the tramways, gave the county council no power to purchase or run omnibus carriages in the streets of London, such a business not being incidental to the working of the tramways.

Now, although in the House of Lords and in the Court of Appeal and in the judgment of Cozens-Hardy, J., the decision is based partly on the ground that the power given to the county council by the London county tramways act 1896 expressly excluded upon its true construction that which did exist as a separate business under the earlier statute, and was not conferred, and obviously was not intended to be conferred, upon the London County Council, yet another ground of all these decisions was that the London County Council were carrying on [89] two businesses,—the business of a tramway company and the business of omnibus proprietors; and that for the one they had express power of Parliament and for the other no authority at all. Lord Macnaghten says [1902] A. C. 169: "It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a sea port." In these last words Lord Macnaghten is obviously referring to the case of *Colman* v. *Eastern Counties Ry. Co.* (1846) 10 Beav. 1, 16 L. J. Ch. N. S. 73, 11 Jur. 74, and when he speaks of the omnibus business not being incidental to the tramway business, he is referring to the words of Lord Selborne in *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 44 L. J. Ch. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 44 J. P. 648, 22 Eng. Rul. Cas. 114, where, although recognizing the principle laid down by Lord Blackburn in the same case, (1880) 5 App. Cas. 481, as the result of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ch. N. S. 185, 2 Eng. Rul. Cas. 304, that "where there is an act of parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited," points out (1880) 5 App. Cas. 478, that the doctrine of *ultra vires* "ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

Now there can be no doubt that the case of *Attorney-General* v. *Great*

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Eastern Ry. Co. (1880) 5 App. Cas. 473, 44 L. J. C. H. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 44 J. P. 648, 22 Eng. Rul. Cas. 114, and the passages quoted were present to the mind of Lord Macnaghten and the other Law Lords and judges who took part in the decision in the *London County Council Case, supra,* and yet they clearly held that the running of the omnibus traffic could not be regarded as consequential on or incidental to the exercise by the London County Council of their statutory powers as a tramway company. Can the court [90] in the light of these decisions regard the running by the Mersey Railway Company of these motor omnibus cars which carry no small number of passengers, of whom a considerable proportion were, and are, passengers not boarding or alighting at stations of the defendant company, as the doing of something consequential on or incidental to the business of a railway company or the exercise by the company of its statutory powers? I think not. The difficulty of so holding is enhanced by the fact that the fares payable by the passengers are in some cases fixed for journeys by passengers neither boarding nor alighting at stations of the railway company. The real position taken up by the defendant company is to say: True, the company do carry on the business of omnibus proprietors, taking up and setting down passengers exactly in the manner and under the conditions under which persons carrying on the business of omnibus proprietors conduct their business, but they carry on that business of omnibus proprietors bona fide for the purpose of giving the public facilities for reaching the railway station of the company or their destinations after traveling as passengers on the railway of the company, and they say further that the competition of the municipal ferry served by the municipal tramways converging at the landing and embarking stages of the ferry makes it essential to the continued conduct of the railway business that the defendant company should afford such facilities for the user by the public of their railway under the Mersey competing with the ferry over the Mersey, and that the defendant company would prefer, if it were possible, which it is not, so to do, to carry by their motor omnibus system exclusively those boarding or alighting at stations of the defendant company.

It is argued that in this state of circumstances we ought, having regard to the position of difficulty in which the railway company are placed, to hold the omnibus system consequential on or incidental to the business of the railway company, but I cannot persuade myself that an omnibus business so carried on is consequential on or incidental to the statutory powers of the defendant company in such sense as to bring the carrying on of the omnibus business within those powers. I think, however, that the court ought, before confirming the order for the injunction [91] to give the defendant company every facility for so modifying the mode of running their omnibus system as to bring it within their statutory powers. I think, therefore, we should postpone the confirmation of the order of Warrington, J., so as to enable the defendant company to modify their system and the court so to limit the terms of the injunction as to leave the company free to supply omnibus facilities for passengers going to or from their station.

Fletcher Moulton, L.J., after stating the facts, added that he found as a fact that this service of omnibuses was started and worked by the defendant company bona fide for the purpose of the passenger traffic on the

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railway, and not with any intention of including in the business of the company the business of an omnibus company as an independent speculation, but that in the manner in which it was now worked the service did not differ from such a business in any of its incidents other than that the times of running of the omnibuses and their routes had been so fixed as most effectively to further the purposes of the railway by promoting its passenger traffic, and he continued as follows:—

The real plaintiffs in this case are the corporation of Birkenhead, who, in the person of the Attorney General, allege that the railway company, in instituting this service of motor omnibuses, are acting *ultra vires* and claim the intervention of the court to prevent their continuing so to act. If they are right in their contention that the acts in question are *ultra vires*, there is no doubt that the action is well founded so far as regards the parties to it. Nor is there any doubt as to the law applicable to the case. It is authoritatively laid down by Lord Halsbury in the case of *London County Council* v. *Attorney-General* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, by reference to the decisions of the House of Lords in the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ch. N. S. 185, 2 Eng. Rul. Cas. 304, and *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 44 L. J. Ch. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 44 J. P. 648, 22 Eng. Rul. Cas. 114. They establish that, in the case of a company created by statute for a special purpose, that which is not permitted by the statute is [92] impliedly prohibited, but that, in applying this principle, whatever may be regarded as incidental to or consequential upon those things which the legislature has authorized ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires. The difficulties that arise in cases like the present, therefore, are not in defining the law, but in applying it to the facts of the particular case.

The first question I propose to consider is the general question whether a railway company may undertake the collection and delivery of passengers from or at their residences, or whether it is *ultra vires* on their part to have anything to do with the carriage of passengers beyond the actual limits of their own railway stations. Valuable assistance in deciding this point may be obtained by considering the case of the carriage of goods. From a date shortly after the first institution of railways it has been consistently recognized by the courts that it is *intra vires* of those companies to collect and deliver goods in this way, and in the case of *Baxendale* v. *London and South Western Ry. Co.* (1866) L. R. 1 Ex. 137, 4 Hurlst. & C. 130, 35 L. J. Exch. N. S. 108, 12 Jur. N. S. 274, 14 L. T. N. S. 26, 14 Week. Rep. 458, it was laid down that this collection and delivery were not acts done by the railway company in their capacity of common carriers, but were auxiliary and subsidiary to the business of the company as carriers by railway. Now railway companies are as unquestionably carriers of passengers by their railways as they are carriers of goods, and, although no doubt the services which they may reasonably perform in the two cases will differ in many respects both in nature and degree by reason of the difference in the subject-matter of these services, I can see no reason based either on law or on good sense why they should not perform the services of collecting

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and delivering passengers in the neighborhood of their stations in the same way as they do goods. If the one service is auxiliary and subsidiary to their functions as carriers of goods by railway, the other seems to me to be equally auxiliary and subsidiary to their duties as carriers of passengers by railway. The reasonableness and the general convenience of their so doing is evident when one thinks of the case of parties consisting of many persons traveling with large amounts of luggage and starting from the same house, as upon [93] such occasions as holiday journeys. But I can see no reason for restricting the power to these extreme cases. If a railway company choose to pick up their passengers at or near their residences, or even in the public streets, and convey them to the station either gratis or for agreed charges, I can see nothing that is *ultra vires* in their so doing.

If, then, these motor omnibuses did no more than collect and distribute passengers or intending passengers on the railway the case would, in my opinion, be free of difficulty. But in the present case the service of omnibuses performs all the functions of an ordinary omnibus service, and makes no distinction whatever between persons who have been or who intend to be passengers on the railway and members of the general public. It is urged, therefore, by the plaintiffs that this is a separate and independent business beyond the statutory powers of the railway company, and that its effect on the business of the company is only an incidental consequence of its existence, and that it therefore comes directly within the scope of the decision of the House of Lords in *London County Council* v. *Attorney-General, supra.*

The facts of the case give strong support to these contentions. It cannot be denied that it is worked in all essential respects as an ordinary omnibus service. The persons whom it picks up at its intermediate stations on its outward journey and those it puts down on its return journey are members of the public who presumably have no connection with the railway traffic, and, indeed, the presence of such persons on the return journeys may actually diminish the advantage of the omnibus service to the railway traffic by occupying places which might otherwise be occupied by intending travelers. These considerations would, in my opinion, be fatal to the plea put forward on behalf of the defendants were it not for a class of cases in which it has been held that where a statutory company has been authorized to purchase and work plant or to acquire property for or in connection with its statutory purposes, and accordingly has in fact purchased such plant and acquired such property bona fide for such purposes, it is not *ultra vires* of the company to use such plant or property for extraneous purposes when and so far as such [94] user does not diminish its availability for those recognized purposes. The most striking instance of this type of case is *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1861) 30 Beav. 40, 7 Jur. N. S. 887, 4 L. T. N. S. 666, 9 Week. Rep. 818. It was there decided that the defendant company, which was authorized to purchase and use steamers for the purposes of a ferry between Barton-on-Humber and Hull, and had for that purpose acquired eight steamers, which were used as required for ferry purposes, might lawfully use them when not so required in taking passengers on excursion trips for reward, on the ground that it was not bound to keep the steamers idle at times when they were unemployed at the ferry, but might use them profitably for other purposes in order to

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diminish the cost of maintaining the ferry service. The case of *London and North Western Ry. Co.* v. *Price & Son* (1883) 11 Q. B. D. 485, 52 L. J. Q. B. N. S. 754, illustrates the same principle, though the user itself was of much smaller importance. The railway company was there held entitled to use and charge for the use of its scales in weighing coal for customers, and even for the public at large, although such weighing had nothing whatever to do with the business of the company.

The court has therefore to draw the line between a user which is in its nature indiscriminate and renders services to the public indifferently, whether such services bear directly on the legitimate objects of the company or not, and one which, while substantially operating to promote the legitimate objects of the company, yet incidentally and without prejudice to its usefulness for those objects may render services for reward to the public, and thus diminish its costliness to the railway company. So long as we are careful to follow the guidance of the principles which have been so definitely laid down by the House of Lords, and which are not, in my opinion, inconsistent with the cases to which I have last referred, this becomes a question of fact rather than of law, and the court has to decide whether the particular acts which are before it come under the category to which the acts of the defendants belonged in the case of *London County Council* v. *Attorney-General* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, or to that in the case of *Forrest* v. *Manchester, Sheffield anad Lincolnshire Ry. Co.* supra. [95] In the former case the critical facts (apart from the question of construction of the provisions of the special act, which was not without its influence on certain members of the Court of Appeal as well as of the House of Lords) were that the service of omnibuses which had been instituted by the London County Council was admittedly under statutory obligations to treat all members of the public alike, independently of whether they were or were not passengers or intending passengers on the tramway, and that the routes and nature of the service distinguished it in no way from any other service of omnibuses in the public streets, or made it specially auxiliary to the tramways, excepting that the ultimate termini of all the routes were at the tramway stations. As the present case was presented to the court below the defendants did not, in my opinion, establish any substantial distinction in their own favor in these matters between this case and that of *London County Council* v. *Attorney-General*, supra, because they admitted they were under like obligations to the public, and even sought to rely upon this as a defense for their conduct. They only urged that they were a railway company, and not a tramway, and further that their service of omnibuses passed to and from a district which was a specially rich source of passenger traffic to them to a greater degree than the streets of London through which the omnibus traffic of the London County Council passed could be said to be a specially rich source of tramway traffic, and that these matters constituted distinctions which put the present case beyond the scope of the decision in the *London County Council Case*. I agree that neither of these distinctions is wholly devoid of weight. But if they stood alone, and if I accepted the defendants' view that they are bound to conduct their omnibus service in the same way as regards the general public as was the case with the London County Coun-

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cil service of omnibuses, I should not have seen my way to distinguish the present case from the earlier one so far as the question of *ultra vires* is concerned. But I am not convinced that this view of their position is correct. The obligation of the London County Council to take all passengers that might present themselves is based on statutory provisions utterly different in [96] language, and in my opinion in meaning, from those under which the omnibuses in the present case come, and I am of opinion that it is within the power of the railway company to decline to take persons other than passengers or intending passengers on their railway, and that if they do so their action will be *intra vires*. And if they cease to hold themselves out as carriers of passengers in their omnibuses otherwise than to and from the railway station, their action will not be rendered *ultra vires* because the public, in individual cases, take advantage of the impracticability of enforcing this restriction rigorously so that occasionally passengers are carried who have no right to use these facilities. But this will necessitate all fares being fixed as fares either from or to some railway station, so that the company will no longer pick up passengers at lower fares between intermediate stopping places, and the service will be run as a service for collecting and distributing passengers, and nothing else, so far as is practicable or as can reasonably be expected from the company.

As I have referred to the contrast between the legislative provisions which obtained in the *London County Council Case*, and those that obtain in the present case as being material for our consideration, I will examine them more in detail. Omnibuses in London are under the provision of the London hackney carriages act 1843 (6 & 7 Vict. chap. 86), and by § 33 it is provided that "every driver or conductor of any metropolitan street carriage . . . who shall refuse to admit and carry at the lawful fare any passenger for whom there is room, and to whose admission no reasonable objection is made . . . shall for every such offense forfeit the sum of 20*s*." This provision amply justifies the statement in the judgment of the judge of first instance in the *London County Council Case* that the omnibuses were compelled by law to carry members of the public indifferently. This act, however, applies only to the metropolis, and the provisions of the town police clauses act 1847 (10 & 11 Vict. chap. 89), the corresponding act for the rest of the Kingdom, are very different. The section of the act which is supposed to compel the drivers of omnibuses in Birkenhead to take any passenger presenting himself is § 52. The earlier portion of this section [97] forbids hackney carriages to ply for hire unless the number of persons to be carried thereby is exhibited upon them, and the later portion is in the following words: "If the driver of any such hackney carriage refuse, when required by the hirer thereof, to carry in or by such hackney carriage the number of persons painted thereon, or any less number, every proprietor or driver so offending shall be liable to a penalty not exceeding 40*s*." The sections of that act were originally enacted with regard to hackney carriages only, but in the special act relating to Birkenhead the operation of this section (in company with certain other sections not material to this case) was extended by the provision that the terms, "hackney carriage or carriages," should "be deemed to include every omnibus, wagonette, or other carriage plying or standing for hire by or used

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to carry passengers at separate fares to, from, or in any part of the borough."

Now it is clear that as originally passed this section refers to cases in which a person having hired a hackney carriage is desirous of using it to its full extent. For instance, if he has hired a four-wheeled cab, the section provides that the driver cannot object to allowing four persons to enter and use the cab. It was obviously intended to deal with such cases and such cases only, and this must of course still remain its significance as applied to hackney carriages. But it is suggested that because the term "hackney carriage" has now been extended to include omnibuses, it must with respect to omnibuses mean that the conductor is bound to take up any person wishing to ride if there is room. To accept this would be to give to the language of the section totally different interpretations in the two cases. The words are perfectly apposite to express the undoubted meaning of the section in the first case. The contract is a contract of hiring, and it is made with the driver. If made it clearly gives to the hirer the legal right to the use of the whole carriage, and it is to insure that he should enjoy to the full the right so acquired by him that the statute has prescribed a penalty on the driver who refuses to allow him to do so. But the words are utterly inappropriate to express the meaning suggested in the second case. The contract is usually made with the conductor, and not with the driver. It is not a contract of hiring of the [98] vehicle or one which, if made, would by law entitle the passenger to the use of the vehicle to its full extent or anything more than the possession of one seat therein. The suggested meaning would give to each passenger the right to compel the driver to carry persons in whom he has no interest and on behalf of whom he has made no contract. To sum up, words which in their original significance (which is still their signification in the case of hackney carriages) relate solely to the faithful carrying out of a contract when made are, by reason of an extension of the definition, to be taken to prescribe the compulsory making of a contract of a wholly different character. I can see no justification for such an interpretation. It is urged that this part of the section must in some way or other be interpreted so as to make it apply to the new subject-matter. I see no such necessity, and it certainly does not justify our putting upon the words of the section two inconsistent interpretations. In my opinion, in spite of the broadening of the definition, this portion of the section does not apply to omnibuses, for the plain reason that by the nature of its provisions it is inapplicable thereto. This is not the case with the earlier part of the section, which is clearly applicable to omnibuses and hackney carriages, and amply accounts for the inclusion of this section amongst those to which the enlarged definition is to apply. I am of opinion, therefore, that the defendant company are not statutably compelled to carry persons in their omnibuses other than passengers or intending passengers on their railway, and that, if they undertake to modify their working of the omnibuses in the way that I have indicated, their action will be *intra vires*, because the doctrine of *ultra vires* is to be applied reasonably.

On these terms, and with these limitations, I am of opinion that the appeal should be allowed. But as at present carried on, I cannot distinguish between that which they are doing and their establishing lines of

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omnibuses to do the whole of the omnibus traffic along certain routes in the town of Birkenhead. Their service is more frequent, and probably more rapid, than the competing traffic of the tramways, and if they are allowed to carry on this traffic without any restriction, it is tantamount to deciding that they may undertake omnibus [99] traffic wherever they think that one of the consequences of its being established will be that passengers are attracted to their railway. This appears to me to be in direct conflict with the principles laid down by the House of Lords in the cases to which I have referred, and more especially with the example which they have given us of the application of those principles in their decision in the case of the *London County Council* v. *Attorney-General* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298.

Buckley, L.J., dissenting: We have here to deal with a statutory corporation. The general rule is that a chartered company can do anything which is not by its charter forbidden, but that a statutory corporation can do only that which is by its statute authorized. The chartered corporation is a corporation at common law. The statutory corporation is not. The latter owes its existence wholly to the statute, and cannot go beyond the statute which creates it. The statute, however, in many cases defines only the purpose; sometimes it also defines special powers. But, whether in the one case or the other, the statutory corporation is not by the general principle above stated restricted to acts specifically mentioned or referred to in the statute. To ascertain whether any particular act is *ultra vires* of the statutory corporation or not, the main purpose must first be ascertained; then the special powers for effectuating that purpose must be looked for, and then, if the act is not within either the main purpose as described in or the special powers expressly given by the statute, the inquiry remains whether the act is incidental to or consequential upon the main purpose and is a thing reasonably to be done for effectuating it. To quote Lord Selborne in *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 478, 44 L. J. Ch. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 44 J. P. 648, 22 Eng. Rul. Cas. 114, the doctrine of *ultra vires* is to be reasonably, and not unreasonably, understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*. By way of illustration, let me suppose that the main purpose found in the statute or in the memorandum of association of a statutory company is to [100] establish and carry on an hotel, and that express power is given to buy land at a particular place and to build, and that as to anything further the statute or memorandum of association is silent. It is quite clear law that all such acts as are reasonably necessary for effectuating that purpose are *intra vires*, such, for instance, as the purchase of furniture, and of linen, of provisions, and of wines and spirits, the hiring of servants, the payment of licenses, the ownership probably of horses and carriages, the maintenance and working of an omnibus which shall attend at the railway station to take intending guests to the hotel and the like. In a large number of cases the maintenance of a garden and pleasure grounds would

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be *intra vires*. The legitimate extent of these would depend upon circumstances. The maintenance of tennis lawns or of a bowling green would, in many circumstances, be legitimate. Under circumstances such as presently put a golf links might be *intra vires*. All these and the like will without express mention be within the company's powers. Then I may instance other acts as to which it would be a question of fact in the case of the particular hotel whether it was such an act as was reasonably incidental or consequential. If, for instance, the hotel were at Bundoran or Rosapenna or elsewhere in the county Donegal it might be *intra vires* to lay out and maintain in good order a golf links or to acquire rights of fishing and to own boats and supply gillies for the purpose of fishing upon the lakes. It may be that in the particular locality custom could only be reasonably expected or obtained by offering those attractions, and they might be as necessary as a smoking room or a bowling green elsewhere. If the hotel in question were the Savoy Hotel in the Strand or the Great Central Hotel in the Marylebone Road the proposition would cease to be true. So, again, if the hotel were situate in a place inaccessible unless special means of communication were provided—say, at a lovely spot at the end of a Scotch loch to which there is no road, or at a place to which there is access by road, but which is not served by any coach or mail cart service—it might be *intra vires* for that hotel to run a steam launch or a motor car to bring its guests to their destination. It would in such a case be analogous to the omnibus which the hotel in the [101] country town sends to the railway station. The question is in each case a question of fact, Is the particular act as to which it is in question whether it is *intra vires* an act which in the circumstances of that particular case is incidental to or consequential upon or reasonably necessary for effectuating the main purpose which the statute defines?

The learned judge below has dealt with this case as if the decision of this court and of the House of Lords in the *Attorney-General* v. *London County Council* [1901] 1 Ch. 781, 70 L. J. Ch. N. S. 367, 84 L. T. N. S. 245, 17 Times L. R. 349; [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, concluded it. In that case, as it appears to me, two matters came in question, and upon the decision of these the case turned. They were, first, the true construction of § 2 of the London county tramways act 1896 (59 & 60 Vict. chap. li.); and, secondly, whether the omnibus business there carried on was a separate business or was one incidental or ancillary to the tramway business. Upon the former of these it was held that the London County Council could only purchase tramway undertakings as contrasted with omnibus undertakings. The vendor to the London County Council owned both a tramway undertaking and an omnibus undertaking. The good will of the omnibus undertaking was excluded from the sale. The first point was that, as matter of construction of the act, the London County Council was excluded from the omnibus business. "The power" (said Lord Halsbury) [1902] A. C. 167, "which is expressly given to the London County Council excludes from them, and to my mind is intended to exclude from them, that which did exist as a separate business under the earlier statute, and which was not intended, and obviously was not intended, to be conferred upon the London County Council." Rigby, L.J., in this court

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had said ([1901] 1 Ch. 799): "If the intention was, and if Parliament was disposed to accede to it, that the county council should take over and work the whole of the company's undertaking, including both branches, namely, the tramway branch and the omnibus branch, it would have been easy to say so in § 2 of the London county tramways act 1896. Nothing of the sort is said, and it is admitted that there is nothing in the section which clearly and specifically refers to a transfer of the whole undertaking and power to run [102] both tramways and omnibuses." Vaughan Williams, L J., pointed to the same consideration ([1901] 1 Ch. 804), and in the court below Cozens-Hardy, J., had emphasized the same point ([1901] 1 Ch. 789). The second question was a question of fact; namely, whether the omnibus business was a separate business. It was held that it was. If this be the true effect of that case, it, of course, does not relieve me from investigating whether upon the state of facts in this case the business is really a separate business or is only one incidental to the main business. From the fact that it was a separate business there it does not follow that it is a separate business here.

Let me first see as a general question whether the ownership and running of omnibuses for the convenience of passengers can be said to be without qualification *ultra vires* of this railway company. The order below has affirmed that it is. The order declares that it is beyond the powers of the defendant company to run or work omnibuses for the purpose of carrying passengers in any of the streets within the borough of Birkenhead. This would preclude the defendant company from supplying for the use of passengers a private omnibus hired by the passenger to take him from or to the station. Nobody has advanced that as a proposition which can be supported. In my opinion it is impossible to support it. A reasonable service to be rendered to the passenger to enable him to make his journey complete is no more as a general proposition *ultra vires* than is the service of a porter to wheel his luggage to a cab, or according to circumstances, say, at Crianlarich, on the West Highland Railway, to the neighboring station of another railway. The order below is, at any rate, too wide.

Then, secondly, if railway companies may own and run omnibuses for some purposes, may they bona fide run omnibuses which are not let to a single particular hirer, but which stand at the station to take up passengers at separate fares and convey them by a definite route to any point of which the passenger may alight? I cannot see how this in principle differs from the first case. There is no magic in a single hirer as distinguished from several passengers at separate fares. The omnibus in that case [103] would, I think, be a facility offered to passengers, and the act would be one reasonably to be done for effectuating the purpose of developing the traffic of the railway.

Thirdly, suppose the omnibus is traveling to the station as an omnibus available to take passengers at separate fares. In such case, there is an obvious difficulty in knowing whether the passenger who hails the omnibus is going to the station or not. If the omnibus be really run as an omnibus to the station, it does not, I think, lose that character by reason of the fact that persons may claim to be passengers in the omnibus who turn out afterwards not to be passengers on the railway.

Lastly, suppose that the omnibus which starts from the station takes up

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passengers in the streets on its journey, does this make the running of the omnibus *ultra vires?* This is, I think, a question of degree. If I arrive at the conclusion that as a matter of fact the service of the omnibus is bona fide supplied for the use of persons who have been or who are going to be passengers on the railway, its employment does not become *ultra vires* because in use as a commercial matter passengers are not refused whose conveyance will add something to the profits or diminish something of the loss upon the working of the omnibuses.

A good deal of discussion has taken place as to whether the company can obtain the license of the corporation to run omnibuses except upon the terms that they shall be bound to take any person on their route who wishes to be a passenger and pays his fare. I think it unnecessary to form any concluded opinion as to whether this is an obligation or not. If it be an obligation so that they cannot run omnibuses bona fide for the purposes of their railway without performing it, then I think it cannot render the act *ultra vires* if they submit to that necessity when, as I find to be the fact, this will be only an adventitious, and not a principal, service. If, on the other hand, they are not bound to come under the obligation, I think, as above stated, that, if the omnibus is really for the purposes of the railway, the act does not become *ultra vires* by their taking to a reasonable extent extraneous traffic which adds something to the commercial prosperity of the undertaking. Upon the authorities a corporation may reasonably use its property in such a manner for [**104**] purposes not forming part of its purpose. I may mention by way of illustration, taking them in order of date, *Simpson* v. *Westminster Palace Hotel Co.* (1860) 8 H. L. Cas. 712, 6 Jur. N. S. 985, 2 L. T. N. S. 707, where a portion of the hotel in the course of being built was let off for a time for a government department; *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1861) 30 Beav. 40, 7 Jur. N. S. 887, 4 L. T. N. S. 666, 9 Week. Rep. 818, where steam vessels, kept for the purposes of a ferry, were employed, when not wanted for that purpose, for excursion trips on the sea; *London and North Western Ry. Co.* v. *Price & Son* (1883) 11 Q. B. D. 485, 52 L. J. Q. B. N. S. 754, where the railway company allowed its weighing machine to be used for hire for weighing someone else's coals; and *Foster* v. *London, Chatham and Dover Ry. Co.* [1895] 1 Q. B. 711, 64 L. J. Q. B. N. S. 65, 14 Reports, 27, 71 L. T. N. S. 855, 43 Week. Rep. 116, where a railway company let its arches for shops.

In my judgment, therefore, the decision of the present case must be simply a decision of this question of fact, Are the defendants really running the omnibuses here in question for the purpose of their railway and so as to obtain and give facilities for better traffic over their line, or is the omnibus business really an independent business in which they look substantially to general street traffic? Upon this question of fact the decision of *London County Council* v. *Attorney-General* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, is not conclusive, nor even necessarily applicable. My great difficulty in the matter arises from the fact that the evidence is so exceedingly meager. The material facts, so far as I know them, are these: That the railway company is one whose undertaking is substantially a short line running under the Mersey between Birkenhead and Liverpool, that its

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service of trains is a service at six-minute intervals, that the omnibuses in question are also run at six-minute intervals so as to connect with the trains, that they run exclusively from and to the central station, that on the omnibuses appears prominently the statement that the omnibus runs to and from the Mersey railway station, that the service ceases in the evening about 7.30 or 8'clock, when the Birkenhead residents, for whom the service is specially intended, have mostly returned to their homes,—a fact which seems to indicate that the defendants do not lay [105] themselves out for general street traffic, such as traffic to the theaters or the like. To the above facts I add that the interest of the defendants is to prefer such person as have been or are going to be passengers on their line, and, so far as they have any power of selection, their interest must be to take such members of the public as are, rather than those that are not, going to travel on the railway. To the above I add this fact, that the plaintiffs and relators in the action, the corporation of Birkenhead, are the owners of a rival means of crossing the Mersey, *viz.*, a ferry, and are the owners of a system of tramways which are convenient for that ferry, and not convenient for the defendants' railway. In the circumstances it was, in my judgment, a reasonable course that the defendants should seek to obtain their proper share of the traffic by giving facilities for reaching their railway, having regard to the facilities which the corporation enjoyed for attracting the traffic to the corporation's ferry. On the other side I have the fact that there are fares charged in two cases between points neither one of which is the central station. Upon these facts I arrive at the conclusion of fact that the defendants did really bona fide establish this system of omnibuses for the purpose of obtaining traffic on their railways; that the omnibuses are, so far as the defendants can insure it, intended to be incidental to their railway, and are reasonably wanted to effectuate the purpose of bringing to their railway the traffic or a fair proportion of the traffic. Thus answered the question is resolved in favor of the defendants.

The defendants are prepared to abandon the separate fares for persons traveling between points neither of which is the central stations, which I will call outlying fares, and to give an undertaking that they will in future make all fares charged upon their omnibuses fares to or from some one of their stations, to the exclusion of fares to and from places neither one of which is such a station. This undertaking removes one matter which rather pressed upon the court, *viz.*, that the railway company might by these outlying fares be holding themselves out as seeking general street traffic, and another matter, *viz.*, that if passengers at these outlying fares became proportionately numerous, a business which I think at present *intra vires* might develop into one which would [106] be *ultra vires*. Upon this undertaking being given, I think the injunction granted below should be discharged.

Vaughan Williams, L.J.: I want to say this in respect of the judgment which I have delivered. There were a few words which I should like to add, and I have asked Buckley, L.J., whether he sees any objection, because in a sense they refer to a matter referred to in his judgment, and he says he has no objection to my adding these words to my judgment to put it right. That is this: You ought to give a wider construction to the words of a memorandum of association creating and defining the powers

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of a purely commercial company having no compulsory power and no monopoly, than you would give to the words of a statute creating a company, like the railway company, having compulsory powers of land purchase and a practical monopoly.

Note.—Implied power of railroad company to engage in transportation of goods or passengers by means other than its railway.

This note does not include cases as to the right of a railroad company, as an incident to the powers granted it, to make traffic contracts with other roads, or to construct spur tracks or lateral railroads.

As to the implied power of a railroad company to engage in or guarantee enterprise other than the transportation of goods or passengers, see notes in 2 L.R.A.(N.S.) 887, and 38 L.R.A.(N.S.) 830.

As to the right of a railroad, street railway, or other common carrier to contract for the use of its cars for advertising purposes, see note in 24 L.R.A.(N.S.) 1010.

So far as a general rule may be extracted from the following decisions, it is this,—that though a railroad company may engage in such transportation of passengers or freight, by means other than its railway, as is accessory or incidental to its main business, it may not engage in the operation of such means of transportation as an independent business, or operate them beyond its terminus, even though the effect may be to attract business to the railroad.

A railroad company is not authorized to use or apply its funds in aiding and carrying on business foreign to and unconnected with its proper and legitimate purposes and objects, although the design and effect may be to augment the business of the road and increase the profits of the corporators. *Central R. & Bkg. Co.* v. *Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353 (citing *Wiswall* v. *Greenville & R. Pl. Road Co.* (1856) 56 N. C. (3 Jones, Eq.) 183, and *Downing* v. *Mt. Washington Road Co.* (1859) 40 N. H. 230, where it was held that a corporation chartered to lay out, make, and keep in repair a toll road between certain points, had no authority to establish stage and transportation lines; and *Pearce* v. *Madison & I. R. Co.* elsewhere set forth); and see also as supporting this point, *Military Interstate Asso.* v. *Savannah, T. B. & I. of H. R. Co.* (1898) 105 Ga. 420, 31 S. E. 200, where a subscription by a railway corporation to the capital stock of a corporation organized to furnish amusement to the public at a point on the line of the railway, and which, therefore, might incidentally increase the transportation business of the railway, was treated as *ultra vires; Brinson R. Co.* v. *Exchange Bank* (1915) — Ga. App. —, 85 S. E. 634, where it was held beyond the powers of a railroad company to donate funds for the

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erection of a public school, or for the purpose of building up or promoting the town in which the school is situated, even though the school or town be located on the line of the railroad's route, and its transportation business might thereby be increased. So, also, in *Hood* v. *New York & N. H. R. Co.* (1850) 22 Conn. 1, it is said that it would be absurd to hold that the directors of a railroad, under the idea of incidental power, may do everything which they think will bring passengers to their road.

Though a temporary stage line to carry passengers around a bridge which has been destroyed, or around a break in the road, is within the incidental powers of a railroad company, for this is, in effect, the use of the road, and a part of the transportation itself, the running of a stage coach to towns lying at a distance from the railroad is not within the implied powers of the corporation, though it may have the effect to bring passengers to the railroad. *Ibid.*

It is immaterial that the railroad is under construction to the point to which stage coaches are run. *Ibid.*

In *Buffit* v. *Troy & B. R. Co.* (1860) 36 Barb. 420, it was held to be within the incidental powers of a railroad company to run a stage between its station and a village a mile distant, where the operation of the stage was not made an independent business carried on for purposes of speculation, nor with a view to compete with rival conveyances from the village, but was strictly incidental to railroad operations, and confined to the immediate neighborhood of the depot. But upon the affirmance of this case in 40 N. Y. 168, it was held that a decision of the point was not necessary to the result.

A steam railroad may not, under its charter, operate a street passenger railroad. *Cincinnati Inclined Plane R. Co.* v. *Cincinnati* (1897) 5 Ohio S. & C. P. Dec. 562, 7 Ohio N. P. 541.

In *London County Council* v. *Atty. Gen.* [1902] A. C. 165, 71 L. J. Ch. N. S. 268, 66 J. P. 340, 50 Week. Rep. 497, 86 L. T. N. S. 161, 18 Times L. R. 298, a case involving the construction of the statutory powers of the London County Council, it was said by Lord Macnaghten that the business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a seaport.

A railroad may engage in the accessorial business of collecting freight with horse power, to be transported upon their own railroad, and delivering freight at the places of destination. *Camblos* v. *Philadelphia & R. R. Co.* (1873) 4 Brewst. (Pa.) 563, Fed. Cas. No. 2,331.

In *Atty. Gen.* v. *Manchester Corp.* [1906] 1 Ch. 643, 22 Times L. R. 261, 75 L. J. Ch. N. S. 330, 70 J. P. 201, 54 Week. Rep. 307, 4 L. G. R. 365, it was held that while it was within the incidental powers of a municipal corporation authorized to operate tramways to

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carry on a parcels delivery business as ancillary to its business of common carrier by tramways, its service must be confined to parcels or goods carried or to be carried on the tramways, and that it had no power to carry on a general parcels delivery business apart from the tramway business.

A railroad cannot, as incident to its charter right to transport persons and goods to a certain city, engage, for the convenience of its patrons, in the business of transporting goods through the city from its railroad depot to another railroad depot. *Macon* v. *Macon & W. R. Co.* (1849) 7 Ga. 221.

In *Dinsmore* v. *Louisville, C. & L. R. Co.* (1880) 2 Fed. 465, which involved the question whether a railroad might refuse to extend its facilities to an express company, it was said that railroads possess no legal rights to engage in the express business.

Under a statute authorizing a railroad company to connect its depot in a city with its railroad on the opposite side of a river, without, however, constructing a bridge across the river, power to establish a ferry may fairly be inferred. *Aikin* v. *Western R. Corp.* (1859) 20 N. Y. 370.

A charter empowering a railroad company to build a railroad along a certain route and "over and across the ferry to East Boston" does not authorize the railroad company to establish and maintain a ferry and take toll for all travel and for purposes in no wise connected with their road. *The Maverick* (1842) 1 Sprague, 23, Fed. Cas. No. 9,316.

A railroad company, under an express authority to establish a ferry across a harbor "as a part of their railroad or route," may not use it for the general transportation of passengers and freight. *Fitch* v. *New Haven, N. L. & S. R. Co.* (1861) 30 Conn. 38.

A railroad does not incur the penalty imposed by statute for maintaining an unauthorized ferry, by transporting its passengers and freight in boats across a river until its bridge shall be rebuilt. *Pugh* v. *Raleigh & G. R. Co.* (1867) 61 N. C. 359.

A railroad company, in the absence of express power, is authorized to make traffic arrangements for transportation by water, or may purchase, own, and operate steamboats or other water craft, when such an arrangement or business legitimately pertains to the corporate purposes, or may reasonably be inferred to have been contemplated and intended by the creating power. *Central R. & Bkg. Co.* v. *Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353.

A railroad company may own and control steamboats for the purpose of transporting their freight and passengers across navigable waters on the line and constituting a part of their routes, and those lying at the end of their roads, separating them from the ostensible and substantial termini of their routes. *Wheeler* v. *San Francisco & A. R. Co.* (1886) 31 Cal. 46, 89 Am. Dec. 147.

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A contract obligating a railroad company, in consideration of financial aid granted by a parish which was physically divided by a river the banks of which the railroad touched at several points, to run boats up and down the river front of the parish, making frequent connection with the railroad at the points in the parish where the railroad touched the river, to the end of giving the people of the parish living on the river, especially those on the opposite bank, direct, easy, and continuous connection with the railroad, is not *ultra vires*. *Atkins* v. *Shreveport & R. River Valley R. Co.* (1902) 106 La. 568, 31 So. 166.

But a railroad company has no implied or incidental power to purchase and run a steamboat on a river which is no part of its route (*Central R. & Bkg. Co.* v. *Smith, supra; Forrest* v. *Manchester, S. & L. R. Co.* (1861) 30 Beav. 40, 7 Jur. N. S. 887, 4 L. T. N. S. 666, 9 Week. Rep. 818); or to run a line of steamers for the transportation of passengers and freight beyond its terminus (*Hoagland* v. *Hannibal & St. J. R. Co.* (1867) 39 Mo. 451; *St. Joseph ex rel. Hannibal & St. J. R. Co.* v. *Saville* (1867) 39 Mo. 460; *Marietta & C. R. Co.* v. *Elliott* (1859) 10 Ohio St. 57; *Pearce* v. *Madison & I. R. Co.* (1859) 21 How. 441, 16 L. ed. 184).

It is not within the incidental powers of a railroad company, for the purpose of increasing its traffic, to guarantee certain profits and secure the capital of an intended steam-packet company who were to act in connection with the railway. *Colman* v. *Eastern Counties R. Co.* (1846) 10 Beav. 1, 16 L. J. Ch. N. S. 73, 11 Jur. 74.

Scope of express grant of power to engage in collateral transportation enterprises.

Where a railroad company is authorized to contract for the transportation and delivery of, and to transport and deliver, persons and property conveyed over their road beyond its terminus, the purchase by the company of a steamboat for the purpose of transporting freight and passengers from the terminus of their road to the line of another is not *ultra vires*. *Shawmut Bank* v. *Plattsburgh & M. R. Co.* (1859) 31 Vt. 491.

A railway company, with express authority to keep steam vessels for the purposes of a ferry, may use such vessels, when otherwise unemployed, for the purpose of excursions. *Forrest* v. *Manchester S. & L. R. Co. supra.*

A grant of power to a railroad chartered to be built across the Isthmus of Panama, to purchase and navigate such steam or sailing vessels as may be proper and convenient to use in conjunction with the said road, is, in view of its project to connect the commerce of the Atlantic and Pacific Oceans, with little or no regard to and with no hope of support from the traffic in its locality, to be construed as

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not simply conferring the right to use such tugs and lighters as may be necessary for the transshipment of goods from the railroad and vessels, but empowers it to operate lines of steamers between its termini and cities on the Atlantic and Pacific coasts. *Freeman* v. *Panama R. Co.* (1876) 7 Hun, 122.

But a statute authorizing railroad companies to build, construct, and run, as part of their corporate property, such number of steamboats or vessels as they may deem necessary to facilitate their business, does not authorize them to enter into partnership with a natural person for the purpose of operating a line of boats. *Gunn* v. *Central R. & Bkg. Co.* (1885) 74 Ga. 509. E. S. O.

[ENGLISH COURT OF APPEAL.]

SCOTT *v.* COULSON.

[1903] 2 Ch. 249.
Also Reported in 72 L. J. Ch. N. S. 600, 19 Times L. R. 440.

Contract — Vendor and purchaser — Mistake — Life policy, sale of — Death of assured before contract — Subsequent knowledge by one party — Assignment — Rescission after completion.

A contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, and the contract was completed by assignment. Between the dates of the contract and the assignment the purchaser received information which led him to believe that at the date of the contract the assured was dead, which after the date of the assignment was ascertained to have been the fact, but the purchaser never disclosed his information to the vendor:—

***Held,* affirming Kekewich, J., [1903] 1 Ch. 453, 72 L. J. Ch. N. S. 223, 51 Week. Rep. 394, 88 L. T. N. S. 12, 19 Times L. R. 162, that the vendor was entitled to have the transaction set aside notwithstanding that it had been completed by assignment.**

(May 4, 1903.)

APPEAL from the decision of Kekewich, J. [1903] 1 Ch. 453, 72 L. J. Ch. N. S. 223, 51 Week. Rep. 394, 88 L. T. N. S. 12, 19 Times L. R. 162.

To the facts stated in the court below should be added the following:

It appeared that although between the dates of the contract and the assignment the defendant Coulson had received informa-

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tion leading him to believe that the assured was dead at the date of the contract, yet the fact of the death did not become actually known to him or to his codefendant, as a matter of certainty, until after the date of the assignment. On March 15, 1902, Coulson wrote to a freind of his living near Wymondham, where A. T. Death, the assured, had resided, asking him if he could find out whether Death was still residing there, and for information about him. To which the friend replied that he had made inquiries as requested, but could obtain no information except that no one of the name of "Death" was then living in Wymondham, and that the only person of that name in the place had, it was believed, died some twenty to thirty years back.

The action was brought against Coulson and Bevis, the [250] purchasers of the policy, and also against the insurance company; but subsequently, upon the insurance company bringing into court the moneys due on the policy, less their costs, an order was made staying the action as against the company.

The plaintiffs, in their statement of claim, alleged that it was an implied term and condition of the agreement for sale and of the deed of assignment that the assured was at the dates thereof alive, so that in the circumstances both instruments were void; that the defendants Coulson and Bevis were at the date of the agreement, or alternatively at the time of completion, aware of the death of the assured, but failed to disclose the fact of such death to the plaintiffs; and that, by reason of such nondisclosure, the plaintiffs were entitled to have the agreement and deed set aside. Paragraph 7 was as follows: "In the alternative the said agreement and the said deed were entered into and executed by the plaintiffs and by the defendants Coulson and Bevis in ignorance of the fact that the said A. T. Death was dead." The plaintiffs then asked to have the agreement and the deed set aside, and for declarations that they were entitled to have the policy returned to them, and to payment of the moneys payable under it. In their statement of defense the defendants Coulson and Bevis admitted the allegation in paragraph 7 of the statement of claim.

At the trial Kekewich, J., held, as already reported, that the plaintiffs were entitled to the relief they asked, with costs, as

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against the defendants Coulson and Bevis, and pronounced judgment accordingly.

The defendants, Coulson and Bevis, appealed.

The appeal was heard on May 4, 1903.

Stewart-Smith, K.C., and **St. John Clerke**, for the appellants. First, we submit that there was no mutual mistake.

[**Romer**, L.J.: Before the assignment the purchasers were aware of the fact that the assured was dead. If they had so informed the vendors, the vendors would have been entitled to rescind the contract.]

We submit not. What the purchasers were buying was a covenant for payment of a sum of money in a certain event.

[251] [**Romer**, L.J.: I doubt if this case is arguable. Before the assignment you knew of the real facts; at all events, you were put upon inquiry. You must be taken to have known that the vendors were entitled to rescind.]

We were under no duty to tell the vendors; and even if we had to make the disclosure, still we would have been entitled to insist upon our contract.

[**Cozens-Hardy**, L.J., referred to *Cooper* v. *Phibbs* (1867) L. R. 2 H. L. 149, 16 L. T. N. S. 678, 15 Week. Rep. 1049, 22 Eng. Rul. Cas. 870.

Vaughan Williams, L.J., referred to *Taylor* v. *Caldwell* (1863) 3 Best & S. 826, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, 6 Eng. Rul. Cas. 603.]

Secondly, even supposing there was a contract which could have been rescinded on the ground of mistake, then, on completion, assuming we were under no duty to disclose any fact coming to our knowledge, there could be no rescission. Non-disclosure may be a ground for refusing specific performance, as to which the court has a discretion; but it cannot be said that personal ownership is altered by subsequent events. The moment a contract is completed by conveyance it cannot be rescinded through innocent misrepresentation, the rights of the parties having become fixed by the conveyance. *Wilde* v. *Gibson* (1848) 1 H. L. Cas. 605, 12 Jur. 527, the principle in which case was applied in *Brownlie* v. *Campbell* (1880) 5 App. Cas. 925, 937, 938, and in *Soper* v. *Arnold* (1887) 37 Ch. D. 96, (1889) 14

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App. Cas. 429, 59 L. J. Ch. N. S. 214, 61 L. T. N. S. 702, 38 Week. Rep. 449.

We further submit that the facts negative the inference that the learned judge drew as to the belief of the parties at the date of the contract. The plaintiffs allege ignorance on both sides of the fact that the assured was dead; and that allegation is admitted by the defendants.

[**Romer, L.J.**: The inference to be drawn from the facts seems to me the only point on which the case can be argued.]

Warrington, K.C. (**Harry Dobb** with him), for the plaintiffs, after shortly going into the facts, was stopped by the court.

Vaughan Williams, L.J.: On the facts of this case, if one takes those which were found by the learned judge in his judgment, I do not see what room there is for argument on any [252] question of law. If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties to the contract supposed the assured to be alive, it is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognized as the basis is not true. Having regard to the evidence, it seems to be clear that the learned judge came to a right conclusion. If it had turned out that the vendors or their agent had requested Coulson to find out whether the assured was dead or alive, and Coulson had come back and said he could not find out, I should have said that, apart from argument, it would have been almost impossible to arrive at the conclusion that both parties had entered into the contract upon the basis that the assured was alive. But it turns out that no such inquiry was requested to be made. The only inquiry requested to be made was that contained in Coulson's letter of March 15, 1902, in which he requested inquiry to be made about the assured. Therefore the inference cannot arise which, if it had arisen, would have been fatal to

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the plaintiffs' contention that this contract was entered into upon the basis that the assured was still alive. If one gets rid of that, what is there left? We have before us the conditions of the proposed sale which were before both parties, in which it certainly seems to be assumed that the assured was still alive.

All I say with regard to the matter is that the material date all through is the date of the contract. If at that date a good contract was entered into, I cannot conceive that it could be rescinded. But it turns out that it was a contract entered into under a common mistake existing at the date of it, and therefore it follows that an assignment executed in pursuance of such a contract cannot be supported.

The learned judge has arrived at a right conclusion, and this appeal must therefore be dismissed, with costs.

[253] **Romer, L.J.:** I agree that this appeal must be dismissed. Upon the facts of the case it appears to me that the learned judge came to the right conclusion; namely, that the contract entered into between the parties to the sale and purchase of this policy rested upon the basis of the assured being still alive. It turns out that, before the matter was concluded by assignment to the defendants, the fact upon which the contract was based was not the fact. The defendant Coulson must be taken to have known that the basis upon which the contract had been entered into, and the common belief upon which both parties had acted, did not exist. That was a circumstance which went to the root of the matter, and rendered it improper to insist upon the completion of the contract. What did Coulson do when he received the information leading him to the knowledge or belief that the assured was dead? Did he do what he ought to have done,—tell the plaintiffs? Not at all. He allowed the plaintiffs to go on under the old belief, and to execute the assignment on the footing that the old basis continued and that the defendants were entitled to an assignment. I need scarcely say that that was wholly unjustifiable from a legal point of view, and also from an equitable point of view, and none the less so because the defendants apparently thought they were justified in taking the assignment.

Such a transaction cannot be allowed to stand, and therefore this appeal must be dismissed.

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Cozens-Hardy, L.J.: I agree. I think the case was argued by Mr. Clarke in the only possible way it could be put on behalf of the defendants. Having regard to the facts as found by the learned judge, it appears to me to be quite plain that at the date of the contract there was a common mistake, both parties being under the belief that the assured was alive.

It would be quite shocking to say that the defendants have rendered the contract absolute simply by having obtained from the vendors an assignment after one of the defendants, Coulson, had full notice that the basis on which the contract had been entered into had had no existence. Under such circumstances [**254**] it is impossible that the defendants can be allowed to derive any benefit from the assignment.

The appeal must, therefore, be dismissed, with costs.

Solicitors: *Dubois & Williams, for R. C. & S. Burrows, Cambridge; Walker, Son, & Field, for A. A. Walker, Cambridge.*

Note.—Assignment or surrender of policy of life insurance, in ignorance of the death of the insured, as subject to rescission as having been made under a mistake of fact.

Of the two questions involved in SCOTT v. COULSON, the more interesting is the one raised by the contention of counsel, and touched upon but briefly by the court, that what the parties were dealing with was a covenant for the payment of a sum of money in a certain event, and therefore that their mistaken belief that such event had not occurred related to a collateral matter, affecting the value of the subject-matter of the transaction, it is true, but not going to its substance.

"It cannot be affirmed that a mistake of fact always avoids a contract. To have this effect, it must be of its essence, the *sine qua non* of the contract, or, as it is expressed, the efficient cause of the concoction. In other words the mistake must have been in reference to a material part of the contract,—material, not merely in the sense that it would have had weight if known, but that it is one of the things contracted about. Therefore a mistake as to a fact wholly collateral, and not affecting the essence of a contract, will not invalidate such contract. In this respect the rule appears to be the same where, because of the mistake, the party treats the agreement as a nullity, as well as where he applies for a rescission thereof by an equity court. The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole con-

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tract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." 6 R. C. L. 620, citing *Tucker* v. *Denton* (1907) 32 Ky. L. Rep. 521, 15 L.R.A.(N.S.) 289, 106 S. W. 280; *Wheat* v. *Cross* (1869) 31 Md. 99, 1 Am. Rep. 28; *Long* v. *Athol* (1907) 196 Mass. 497, 17 L.R.A.(N.S.) 96, 82 N. E. 665; *Sherwood* v. *Walker* (1887) 66 Mich. 568, 11 Am. St. Rep. 531, 33 N. W. 919; *Miles* v. *Stevens* (1846) 3 Pa. St. 21, 45 Am. Dec. 621; *Trigg* v. *Read* (1845) 5 Humph. 529, 42 Am. Dec. 447; *Ross* v. *Armstrong* (1860) 25 Tex. Supp. 354, 78 Am. Dec. 574; *Thompson* v. *Jackson* (1825) 3 Rand. (Va.) 504, 15 Am. Dec. 721; *Buffalo* v. *O'Malley* (1884) 61 Wis. 255, 50 Am. Rep. 137, 20 N. W. 913; *Kowalke* v. *Milwaukee Electric R. & Light Co.* 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762.

Ordinarily, a mistake as to the value of the subject of the transaction, though mutual, does not prevent the minds of the parties from meeting, and so is not ground for rescission (see *Sankey* v. *First Nat. Bank* (1875) 78 Pa. 48); unless of such a character as to amount to a mistake of identity; as, where one having a gold coin issued by a private individual of the value of $10 paid it out by mistake for half a dollar (*Chapman* v. *Cole* (1858) 12 Gray, 141, 71 Am. Dec. 739); or where a blooded cow, believed by the buyer and seller to be barren, proved to be with calf (*Sherwood* v. *Walker* (1887) 66 Mich. 568, 11 Am. St. Rep. 531, 33 N. W. 919); or where a claim assigned for a nominal sum, and thought to be worthless, proved to have valuable security the existence of which was unknown to the parties (*Flynn* v. *Smith* (1906) 111 App. Div. 870, 98 N. Y. Supp. 56; but compare *Wood* v. *Boynton* (1885) 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42, where the court refused to rescind the sale of an uncut stone bought and sold in the belief that it was a topaz but which proved to be a yellow diamond).

As to whether, in the case of transactions with respect to a policy of life insurance, the parties are to be deemed to have dealt on the basis of the continuance of the life insured, or to have taken the risk of the doubt, is clearly a question of fact; and it should be noted that the courts which have had occasion to consider the question have, as courts of equity, decided it as a question of fact, and not of law. It is ordinarily a matter of inference rather than direct proof, and therefore a matter upon which men may reasonably differ.

The case most nearly analogous to SCOTT v. COULSON is *Riegel* v. *American L. Ins. Co.* (1891) 140 Pa. 193, 11 L.R.A. 857, 23 Am. St. Rep. 225, 21 Atl. 392. This was an action brought to rescind a contract by which a policy of life insurance had been surrendered for a paid-up policy, in which the question was raised whether a case for equitable relief was stated by a bill which averred that complainant's decedent was a creditor of one Leisenring, and that to

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secure his claim he took out a policy of insurance on the life of his debtor, upon which he continued to pay the premiums during his lifetime; that the complainant, his widow and administratrix, had continued to pay them; that neither the complainant nor the insurance company had known the whereabouts of the insured for thirteen years; that ten days after the death of the insured, and while the fact was yet unknown, complainant surrendered the policy on his life and accepted a new policy for an amount which was considerably less, as a paid-up policy, in order to be relieved from the burden of the annual premium. The court below held that the case was one where both parties had treated upon the basis of the fact being doubtful, and had taken the risk of the doubt, and therefore that equity would not interfere, but would leave the parties where they were. Upon appeal to the supreme court, plaintiff's counsel filed at the bar of that court, before proceeding with the argument, an amendment to their bill, in which amendment they averred that "the parties acted in respect to the transaction on the basis that the said Leisenring was still alive." A majority of the supreme court held that the case was one of mutual mistake, against which equity would grant relief, rather than a case in which the parties had taken the risk of the doubt, saying: "The case presented on these facts was that of a contract entered into under the influence of a mutual mistake, and a claim for relief from such contract. The mistake was in relation to the fact of Leisenring's death. Both parties evidently supposed, and acted on the supposition, that he was alive, and that the annual premiums upon his life, which had become burdensome to Mrs. Riegel, must be continued indefinitely, until his death should take place. As it had become difficult for her to pay these premiums, the only way in which she could be relieved from them was to surrender her policy, and accept a paid-up policy for such smaller sum as the premiums already paid would purchase. Rather than take the risk of losing the entire amount of the policy by her inability to keep up the annual payments, she surrendered her policy for $6,000, and accepted in lieu of it a paid-up policy for $2,500. This was the contract she made while in ignorance of Leisenring's death. At the time she made it she was already relieved from the burdensome premiums, and the entire amount of the policy was honestly due her from the company. What was the effect of the mistake upon her? Simply to take from her the difference between the two policies and give her absolutely nothing for it. She surrendered a policy for $6,000 on which the liability of the company was already fixed, and received one for $2,500 to secure relief from a burden already removed. The company parted with nothing. She secured nothing. The whole transaction was a mistake, and if the decree of the court below stands, the result will be to take $3,500 from Mrs. Reigel, and give it to the insurance company. These facts seem to us to present a clear and a strong

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case for equitable relief, so strong, indeed, that a mere statement of them is the only argument necessary for its support. . . . The learned judge who heard this case in the court below and who is thoroughly familiar with the principle to which we have referred, seems to have been misled in regard to the facts set up in the bill. He treats the arrangement made between Mrs. Riegel and the company on the 20th of March as a compromise of a claim against the company for the alleged death of Leisenring, which Mrs. Riegel was unable to establish, because unable to show the death. As the fact of the death, and the consequent liability of the company on the policy, were uncertain, it was a case for the application of the doctrine that the adjustment of a doubtful claim constituted a valid consideration for the surrender of the policy and the acceptance of the new one; and upon this theory the decree was entered. But it nowhere appears that Mrs. Riegel made any claim on the company, or supposed that she had any. She was asking relief from future payments of premiums on a policy on which she supposed future payments would have to be made, and to get this relief she was willing to sacrifice more than one half of the sum insured. The company was willing, in consideration of the large reduction of its liability, to give her a policy for what her payments would purchase, and relieve her in future. This is an exchange often made and adjusted by well-settled rules. It was a compromise of nothing. We do not doubt the correctness of the rule applied by the learned judge in cases to which it is fairly applicable, but this is not one of them. The plaintiff distinctly avers that she did not know of the death of Leisenring until some ten days after the exchange of policies was effected, and that 'both parties to the transaction were acting in respect thereto on the basis that Leisenring was alive.' She distinctly avers that the object of the arrangement was to secure relief for herself from the indefinite payment of premiums that had become burdensome to her; that the new policy was accepted for that reason, and the old one surrendered at a time when, had she known the fact, she was entitled to demand the entire sum upon which she had so long and so steadily paid the burdensome premiums. Upon these facts, if the attention of the learned judge had not been diverted from them, we feel sure that he would have reached the conclusion that we have reached, that it would be grossly inequitable to hold the plaintiff to a bargain made under the influence of a mistake of facts like that before us."

The bill having thus been sustained, an answer was put in, and the case sent to an examiner and master to take evidence. The court below was of the opinion that the plaintiff had altogether failed to make good her declaration that the agreement whereby the first policy was surrendered and a new one issued was made under any mutual mistake of facts by the parties, and therefore that the case did not fall within the category of cases entitled to relief in equity upon

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the ground of mutual mistake; but was again reversed by the supreme court (Paxson, Ch. J., and Mitchell, J., dissenting), which said: "It cannot be doubted that in exchanging the old for the new policy both parties acted on the basis that Leisenring was then alive. Their every act in the transaction was predicated of that as an assumed fact. The new policy, like the old one, was a risk on a life assumed to be then in being. The difference between them was that the one carried with it an obligation on the part of the holder to pay annual premiums during the life of Leisenring; the other exempted her from that obligation. She purchased that exemption by surrendering seven twelfths of the original insurance, or $3,500. If the exchange was not made on the assumption by both parties that Leisenring was then alive, the company stultified itself by issuing a paid-up policy on the life of one who was then in his grave; and the plaintiff was guilty of the supreme folly of paying $3,500 for exemption from a liability which, by the previous death of Leisenring, had *ipso facto* ceased. In other words, at the time the exchange of policies was made, the plaintiff had a perfectly valid claim upon the defendant for the full amount of the insurance, $6,000, and surrendered $3,500 of that to secure exemption from a liability that had ceased to exist; but she and the company were both at that time ignorant of the fact that the life on which the original risk was taken had previously dropped. The supposed element of doubt as to whether Leisenring was then dead or not never entered into the contemplation of either party, nor did it form any part of the consideration for exchange of policies. The positive and uncontradicted proof by the actuary of the company was that the amount of the paid-up policy was ascertained and fixed according to the established rules of the company, at the very sum that would have been required if Leisenring had been personally present in the office when the terms of exchange were settled. The central fact underlying the transaction, and to which every circumstance connected therewith clearly points, was the assumption by both parties that Leisenring was then in full life. When last theretofore heard from he was alive, and the presumption was that he continued to live. In the absence of any knowledge to the contrary, it was quite natural and reasonable that the parties, in making the exchange, should act upon that presumption, and assume, as they evidently did, that he was still alive. Of course they could not know positively that he was then alive, any more than anyone can certainly know that a friend from whom he is far separated by distance is now living. In view of the undisputed facts as to the acts of both parties, and everything connected with the transaction, it would be wholly unreasonable and unwarranted to hold that the parties treated upon the basis that the fact which was the subject of their agreement was doubtful, or that the contract was made 'in view of doubtful facts, and because of the doubtful facts.'" *Riegel* v.

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American L. Ins. Co. (1893) 153 Pa. 134, 19 L.R.A. 166, 25 Atl. 1070.

In *Masonic Life Asso.* v. *Crandall* (1896) 9 App. Div. 400, 41 N. Y. Supp. 497, it was held that the insurer might recover a payment made upon proofs of death of the party insured, where it afterward turned out that he was alive. While it appears that in that case the beneficiary had, upon rumors being current that the insured was alive, agreed with the insurers to reconvey what was left of the money she had received from them if the insured should prove to be alive, and this agreement was held to be founded on a good consideration, the decision was not based on that ground; but the court went further and held that the insurers were entitled to recover in any event, saying that the beneficiary's "right to the insurance money did not attach until her husband died, and with the fact undisputed that he was alive when the proofs of death were made, and has been ever since, she cannot evade the repayment of these moneys;" that even in the absence of an agreement to do so, she would be liable to refund the money in case the insured was alive, "for his death was the essential prerequisite to her right to it;" that the insurance money was paid to her on the hypothesis that the insured was dead; and that, "if this was untrue, a mistake of fact existed, and the proposition is elementary that repayment to the insurers could be compelled."

In *Sears* v. *Grand Lodge, A. O. U. W.* (1900) 163 N. Y. 373, 50 L.R.A. 204, 57 N. E. 618, where a benefit society against which suit had been brought by the beneficiary of a certificate issued upon the life of a person who had not been seen or heard of for nearly ten years, entered into a compromise agreement to pay a certain sum at once and to place the remainder of the insurance money in trust to be held for a certain time, at the end of which it should be paid to the beneficiary if in the meantime the society could not prove beyond a reasonable doubt that the insured was living, it was held that under the circumstances there was no mutual mistake of fact as to the continued existence of the insured, which, upon his proving to be alive, would exonerate the insurer from liability for the agreed cash payment, but that the case was governed by the rule that when parties have entered into a contract or arrangement based upon certain or contingent events purposely as a compromise of doubtful claims arising from them, and there is an absence of bad faith, violation of confidence, misrepresentation, or concealment, if the facts upon which such agreement was founded or the event of the agreement itself turns out very differently from what was expected or anticipated, this error, miscalculation, or disappointment is not such a mistake as entitles the disappointed party to any relief, either by way of canceling the contract and rescinding the transaction, or as a defense to a suit brought for its enforcement.

In *New York L. Ins. Co.* v. *Chittenden* (1907) 134 Iowa, 620, 11

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L.R.A.(N.S.) 237, 120 Am. St. Rep. 444, 112 N. W. 96, 13 Ann. Cas. 408, it was held that a payment by an insurance company of the amounts due on policies on the life of a person who had disappeared for more than seven years could not, upon his reappearance, be recovered as having been made under a mutual mistake of fact, as it was evident that under the circumstances the assumption of the death of the insured was treated by the parties as a doubtful one.

In *Ancient Order, U. W.* v. *Mooney* (1911) 230 Pa. 16, 79 Atl. 233, where the insured had disappeared and had not been heard from for more than seven years, thereby raising a presumption of his death, and, the beneficiary demanding payment, the insurer made payment and took from the beneficiary a bond to insure the return of the money in case it should be found that the insured was alive, it was held that the bond was not given under a mutual mistake respecting the death of the insured so as to preclude its enforcement where it turned out that the insured was then alive.

Accepting an overdue payment of premium after the death of the insured, of which both parties are ignorant, does not bind the insurer and keep the policy alive. *Miller* v. *Union Cent. L. Ins. Co.* (1884) 110 Ill. 102; *Pritchard* v. *Merchant's & T. Mut. Life Assur. Soc.* (1858) 3 C. B. N. S. 622, 27 L. J. C. P. N. S. 169, 4 Jur. N. S. 307, 6 Week. Rep. 340.

In the present connection it may be of interest to refer to various other instances in which the question was whether the parties were to be deemed to have contracted on the basis of the continuance of the life of a third person.

In *Cochrane* v. *Willis* (1865) L. R. 1 Ch. 58, 35 L. J. Ch. N. S. 36, 13 L. T. N. S. 339, 14 Week. Rep. 19, where a tenant for life having become insolvent, the remainderman, being desirous of preserving the timber on the estate from being cut, signed an agreement with the agent of the official assignee for the benefit of creditors, agreeing that the assignee should have the same right to the timber as if he had actually cut it upon a certain past day named, which was prior to the death of the tenant for life; and the assignee agreed to refrain from cutting it for a month. It turned out that the tenant for life was dead at the date of the agreement, although the parties thereto were ignorant of the fact. It was held that as at the date of the agreement the timber had become the property of the remainderman, his agreement with respect thereto was without consideration and would not be enforced.

In *Moehlenpah* v. *Mayhew* (1909) 138 Wis. 561, 119 N. W. 826, it was held that where the seller and purchaser of a remainder interest did not know of the death of the life tenant, there was a mutual mistake of fact as to the subject-matter of the sale, which was sufficient to avoid the contract in the absence of negligence or subsequent acqui-

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escence. The court said: "Where there is no doubt as to the subject-matter, the mere fact that one has in fact sold more than he thought he was selling, or the other got more than he expected, is not sufficient to avoid a contract; but where there is a mutual mistake as to the subject-matter, that condition is sufficient to avoid the contract. In the instant case the subject-matter of the purchase by Mayhew and the sale by Roberts was a right in remainder subject to the life of the widow, and subject to be partially or wholly dissipated by reason of the necessities of the life tenant. It was analogous to a contingent remainder of one third of the estate. This was the subject-matter of the contract, and was what both parties to the contract believed they were dealing with; but by reason of the prior death of the widow they were in fact buying and selling an absolute estate or right immediately available in possession and ownership, and not subject to further diminution or depletion. There was consequently a mutual mistake of fact as to the subject-matter of the sale, and also, as in all such cases, one bought more than he expected and the other sold more than he thought he was selling."

Conversely, where at the time of the purchase of an annuity during the life of a third person, the annuitant was dead, a circumstance of which the parties were mutually ignorant, it has been held that money paid therefor was paid without consideration and might therefore be recovered back. *Strickland* v. *Turner* (1852) 7 Exch. 208, 22 L. J. Exch. N. S. 115.

And in *Allen* v. *Hammond* (1837) 11 Pet. 63, 9 L. ed. 633, it was said by way of illustration: "Suppose a life estate in land be sold, and at the time of the sale the estate has terminated by the death of the person in whom the right vested, would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake."

In *Boyer's Estate* (1899) 23 Pa. Co. Ct. 52, where the facts are so obscurely stated that the situation involved can only be guessed at, there seems to have been a purchase of an encumbrance on certain legacies for the benefit of the legatees, in mutual ignorance of the death of the person at whose death they were to become payable, and it was held that the mistake was one for which the court would grant relief.

In *Colyer* v. *Caly* (1843) 7 Beav. 188, where one entitled to a reversionary interest in a fund jointly with another, with benefit of survivorship between them, sold his interest, neither the seller nor the purchaser knowing that the coreversioner was then dead, it was held that the parties having entered into the contract under a common mistake, it would be manifestly unjust to permit the sale to stand.

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March v. *Pigot* (1771) 5 Burr. 2802, was a case of a wager under the following circumstances: "The wager was originally proposed between young Mr. Pigot, the present defendant, and young Mr. Codrington, to run their fathers (to use the phrase of that place) each against the other. Sir William Codrington, the father of Mr. Codrington, was then a little turned of fifty: Mr. Pigot's father was upwards of seventy. Lord Ossory computed the chances according to the above-mentioned ages of their respective fathers. Mr. Codrington thought the computation was made too much in his disfavor; whereupon Lord March agreed to stand in Mr. Codrington's place: and reciprocal notes were accordingly given between the earl and Mr. Pigot. Mr. Pigot's note run this,—'I promise to pay to the Earl of March 500 guineas if my father dies before Sir William Codrington. William Pigot:' The Earl's was,—'I promise to pay to Mr. Pigot 1,600 guineas in case Sir William Codrington does not survive Mr. Pigot's father. March.' No mention was at all made at the time of this transaction about their fathers being then dead or alive, but the fact was that Mr. Pigot's father was then actually dead, he died in Shropshire, 150 miles from London, at 2 o'clock in the morning of the same day on which this bet was made at Newmarket after dinner. However, this fact was not, at that time at all known to any of the parties, nor was there any reason for suspecting that Mr. Pigot's father was then dead." The question whether it was intended by the parties to be an essential condition of the contract that both fathers should be alive was left to the jury, which found in favor of the plaintiff; and it was held by the court that they were warranted in so finding, and that the mere survivorship was the thing intended to be betted upon.

Right to rescind for mutual mistake as affected by circumstance that contract has become executed.

The principal question discussed in SCOTT v. COULSON, whether a mutual mistake of such a character as to warrant rescission of a contract still executory is likewise ground for rescission of a contract which has become executed, is one which has been but seldom directly considered. While it is true that a court of equity will often refuse specific performance and thereby deprive a party of the benefit of his contract under conditions which would not move it to a rescission of the contract whereby the same result would be obtained (see *Hope* v. *Walter* (1900) 1 Ch. 257, 69 L. J. Ch. N. S. 166, 82 L. T. N. S. 30, 16 Times L. R. 160; *Newman* v. *Kay* (1905) 57 W. Va. 98, 68 L.R.A. 908, 49 S. E. 926, 4 Ann. Cas. 39), this is in cases where the mistake was of an extrinsic or collateral character, and did not go to the substance of the thing contracted for.

It is, however, to be noted that the fact of mutual mistake going to

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the essence of the transaction will not necessarily entitle a complainant to equitable relief. Other conditions must concur, such as prompt action upon the discovery of the mistake, and the possibility of a substantial restoration of the *status quo*.

That the fact that the contract has become executed is in itself no obstacle to equitable relief is expressly held in *Paine* v. *Upton* (1882) 87 N. Y. 327, 41 Am. Rep. 371, where it was said: "The point remaining to be decided is, whether the acceptance of the deed, and the giving of the bond and mortgage, barred the antecedent right of the plaintiff to have the mistake corrected. It cannot be denied that this claim finds some support in the observation of judges, but no case has been called to our attention, nor have we found any, where the point has been so adjudged. The suggestion in some of the cases, that by the acceptance of a deed containing the words, 'more or less,' or 'by estimation'), in connection with the statement of quality, the purchaser is concluded from obtaining relief on the ground of mistake, appears to have been founded upon an inference from the language used in Sugden on Vendors (vol. 1, p. 526). The distinguished author of that work, referring to the general subject, says: 'Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words "more or less," or "by estimation."' It will be perceived that the writer does not say, that after a conveyance, such relief cannot be granted, but the language has been sometimes regarded as implying this. It seems to us, however, that this is a misconception of the author's meaning. In the paragraph preceding the one quoted, the author had stated, that 'where the lands in a conveyance, are mentioned to contain so many acres by estimation, or the "words more or less," are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency.' This language clearly implies that in case of a considerable and material discrepancy in quantity, relief could be had, after a conveyance. The paragraph just quoted is followed by a reference to a case referred to in the *Anonymous Case* (1689) Freem. Ch. 107, in these words: 'A case is said to have been decided where a man conveyed his land by the quantity of 100 acres were it more or less, and it was not above 60 acres; but the purchaser had no relief, because it was his own laches.' This language is immediately followed by the language first quoted, upon which the defendants rely to establish the proposition that relief against mistake as to quantity, when the words 'more or less,' or equivalent words are used, can only be granted before a conveyance, and when the contract of sale is *in fieri*.

"Mr. Sugden, as will be noticed, uses very guarded language in

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referring to the case cited in Freeman, speaking of it as a case said to have been decided, and Judge Story, in *Stebbins* v. *Eddy* (1827) 4 Mason, 418, Fed. Cas. No. 13,342, referring to the same case, remarks, that Mr. Sugden thinks the case open to much observation. The case is doubtless in conflict with many authorities in holding that the words 'more or less' covered so large a deficiency. The statement by Mr. Sugden, in the subsequent paragraph, that the general opinion was that relief could be granted where the contract was *in fieri*, was not, we think, intended to imply that in his opinion, relief could only be granted before a conveyance; but was designed, by bringing into view the principle upon which courts proceed in respect to contracts to convey, to discredit the doctrine of the unreported case immediately before referred to, in which the conveyance had been executed.

"Considering the question on principle, we can perceive no solid ground for affirming the jurisdiction of a court of equity in the one case, and denying it in the other. The general jurisdiction of a court of equity to set aside, or to reform written instruments, in cases of fraud or mistake, is not limited to executory contracts. Such a limitation, as was said by Robertson, Ch. J., in *Harrison* v. *Talbot* (1834) 2 Dana, 258, would be irreconcilable with an obvious and pervading principle of justice. It is doubtless true that the annulling or reforming of executed transactions is an exercise of supreme judicial power. The power should be exercised with great caution, and, when invoked on the ground of mistake, a plain case should be made, before it is exerted. But these are considerations which address themselves to the chancellor, in the exercise of the jurisdiction; they ought not to prevent the interference of equity when the proper occasion for interference arises. The granting or refusing of equitable relief on the ground of mistake may depend, to some extent, on the fact whether the contract is executory or executed. The court might very well refuse the specific performance of a contract for the sale of land, in respect to which a mistake is alleged, and leave the party to his remedy at law, when it would not interfere, if the contract had been executed. But it cannot, we think, be maintained upon principle that where a mistake is admitted or proved, the fact that the title has passed, and the purchase money has been paid or secured, precludes the court, on the mistake being discovered, from granting relief. The consummation of the transaction in ignorance of the mistake, without laches on the part of the party injured, gives to the other party no immunity from making recompense, nor does it deprive the court of the power to remedy the injustice."

The doctrine of the foregoing case is followed in *Gould* v. *Emerson* (1894) 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065, where upon settlement of partnership accounts a note had, by mutual mistake, been given for double the amount due; *J. P. Eustis Mfg. Co.*

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v. *Saco Brick Co.* (1908) 198 Mass. 212, 84 N. E. 449, where a contract for the sale of an engine had been performed; and *L. D. Garrett Co.* v. *Halsy* (1902) 38 Misc. 438, 77 N. Y. Supp. 989, where an agreement for the sale of corporate stock had been executed by a transfer thereof.

In *Winston* v. *Pittsfield* (1915) 221 Mass. 356, 108 N. E. 1038, it is said that the jurisdiction of a court of equity to decree appropriate relief where it appears that a bilateral contract, whether executory or fully performed by the plaintiff, has been entered into under mutual and material errors of fact, and the bill is seasonably brought upon discovery of the mistake, is well settled.

In *Cohen* v. *Ellis* (1885) 16 Abb. N. C. 320 (reversed on another ground in 26 N. Y. Week. Dig. 43), it is said to be no answer to an action for a rescission of an instrument upon adequate grounds that the transaction has been completed.

In *Rockafellow* v. *Baker* (1861) 41 Pa. 319, 80 Am. Dec. 624, the court said, in passing, that palpable mistake is ground for rescinding an executed contract.

In *Thompson* v. *Jackson* (1825) 3 Rand. (Va.) 504, 15 Am. Dec. 721, it is said that in order to warrant rescission of an executed contract on the ground of mistake, the mistake must be plain and palpable, and must affect the very substance of the subject-matter of the contract.

In *Glassell* v. *Thomas* (1831) 3 Leigh, 113, it is said that mutual error in the substance of the thing contracted for is a good ground for rescinding even an executed contract.

In *Debenham* v. *Sawbridge* [1901] 2 Ch. 98, 70 L. J. Ch. N. S. 525, 49 Week. Rep. 502, 84 L. T. N. S. 519, 17 Times L. R. 441, it is said that rescission of a contract for the sale of property on the ground of mutual mistake may be granted in a proper case even after conveyance.

But in *Beebe* v. *Swartwout* (1846) 8 Ill. 162, it is said that there is a distinction between contracts of an executory character and those which are fully executed by deeds or conveyances, and that in the latter case there can be no rescission of the contract unless it is tainted by actual fraud.

That a court of equity may decree rescission of an executed contract has also been tacitly assumed in many instances. See, *inter alia, Griffith* v. *Sebastian County* (1886) 49 Ark. 24, 3 S. W. 886; *Barfield* v. *Price* (1871) 40 Cal. 535; *Barth* v. *Deuel* (1888) 11 Colo. 494, 19 Pac. 471; *Bivins* v. *Kerr* (1915) 268 Ill. 164, 108 N. E. 996; *Lewis* v. *Mote* (1909) 140 Iowa, 698, 119 N. W. 152; *Dzuris* v. Pierce (1913) 216 Mass. 132, 103 N. E. 296; *Harrison* v. *Stowers* (1824) 1 Walk. (Miss.) 165; *Powell* v. *Plant* (1898) — Miss. —, 23 So. 399; *Summers* v. *Coleman* (1883) 80 Mo. 488; *Castleman* v. *Castleman* (1904) 184 Mo. 432, 83 S. W. 757; *Clark* v. *Carter*

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(1911) 234 Mo. 90, 136 S. W. 310; *Blair* v. *M'Donnell* (1846) 5 N. J. Eq. 327; *Gillespie* v. *Moon* (1817) 2 Johns. Ch. 585, 7 Am. Dec. 559; *Tryon* v. *Lyon* (1909) 133 App. Div. 798, 118 N. Y. Supp. 5; *Dunn* v. *Dunn* (1912) 151 App. Div. 800, 136 N. Y. Supp. 282; *Irwin* v. *Wilson* (1887) 45 Ohio St. 426, 15 N. E. 209; *Walker* v. *Dunlop* (1818) 5 Hayw. 271, 9 Am. Dec. 787; *Ladd* v. *Pleasants* (1873) 39 Tex. 415; *Irick* v. *Fulton* (1846) 3 Gratt. 193; *Lee* v. *Laprade* (1907) 106 Va. 594, 117 Am. St. Rep. 1021, 56 S. E. 719, 10 Ann. Cas. 303; *Hall* v. *Graham* (1911) 112 Va. 560, 72 S. E. 105, Ann. Cas. 1913B, 1257; *Hansford* v. *Chesapeake Coal Co.* (1883) 22 W. Va. 70; *Baxter* v. *Tanner* (1891) 35 W. Va. 60, 12 S. E. 1094; *Wilson* v. *McConnell* (1913) 72 W. Va. 81, 77 S. E. 540,—in all of which contracts for the sale of land had become executed by the making and delivery of a deed; *Barker* v. *Fitzgerald* (1903) 105 Ill. App. 536, judgment affirmed on opinion of court below, 204 Ill. 325, 68 N. E. 430; *Bedell* v. *Wilder* (1892) 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589, where an agreement for a lease had been carried into effect by the execution of the lease; *Hutchinson* v. *Bambas* (1911) 249 Ill. 624, 94 N. E. 987; *Knight* v. *Lanfear* (1844) 7 Rob. (La.) 172; *Harrell* v. *De Normandie* (1861) 26 Tex. 121; *Castleman* v. *Waghorn* (1908) 41 Can. S. C. 88, which were cases of completed sales of securities; *Colyer* v. *Clay* (1843) 7 Beav. 188; *Flynn* v. *Smith* (1906) 111 App. Div. 870, 98 N. Y. Supp. 56, which were cases of assignments of choses in action; *Neill* v. *Midland R. Co.* (1869) 20 L. T. N. S. 864, 17 Week. Rep. 871; *Long* v. *Athol* (1907) 196 Mass. 497, 17 L.R.A.(N.S.) 96, 82 N. E. 665; *Winston* v. *Pittsfield* (1915) 221 Mass. 356, 108 N. E. 1038, which were cases of partly performed construction contracts.

In this connection reference may be made to cases in which the owner of goods, after having sold them to an impostor, has been permitted to maintain trover therefor, or to recover their value from one to whom the impostor has resold them. *Alexander* v. *Swackhamer* (1885) 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908; *Peters Box & Lumber Co.* v. *Lesh* (1889) 119 Ind. 98, 12 Am. St. Rep. 367, 20 N. E. 291; *Moody* v. *Blake* (1875) 117 Mass. 23, 19 Am. Rep. 394; *Hamet* v. *Letcher* (1881) 37 Ohio St. 356, 41 Am. Rep. 519; *Barker* v. *Dinsmore* (1872) 72 Pa. 427, 13 Am. Rep. 697; *McCrillis* v. *Allen* (1888) 57 Vt. 505; *Hardman* v. *Booth* (1863) 1 Hurlst. & C. 303, 9 Jur. N. S. 81, 32 L. J. Exch. N. S. 105, 7 L. T. N. S. 638, 11 Week. Rep. 239; *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 406, 14 Cox, C. C. 93, 6 Eng. Rul. Cas. 211.

Reference may also be made to *Allen* v. *Hammond* (1837) 11 Pet. 63, 9 L. ed. 633, where it was held that equity would decree cancelation of a contract to collect a claim against a foreign government made in ignorance of the fact that the claim had already been al-

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lowed; *State Sav. Bank* v. *Buhl* (1901) 129 Mich. 193, 56 L.R.A. 944, 88 N. W. 471, where it was held that a warehouseman might stop payment on a check given in settlement of a claim for an article intrusted to him, in the belief that it had been stolen, where the article was afterward found to have been mislaid.

So, where there was no meeting of the minds of the parties to a contract as to the quantity of goods to be furnished thereunder, the one who has furnished them may recover therefor on a *quantum meruit* basis. *Hartford & N. H. R. Co.* v. *Jackson* (1856) 24 Conn. 514, 63 Am. Dec. 177.

And where by misapprehension of the intended destination a mistake has been made in quoting a freight rate, a railroad may recover a reasonable price for its services in transporting the goods. *Rowland* v. *New York, N. H. & H. R. Co.* (1891) 61 Conn. 103, 29 Am. St. Rep. 175, 23 Atl. 755. E. S. O.

[HOUSE OF LORDS.]

JANSON, *Appellant,*

and

DRIEFONTEIN CONSOLIDATED MINES, LIMITED, *Respondents.*

[1902] A. C. 484.

Also Reported in 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.

Insurance — Capture — Property of alien enemy — Loss before beginning of war — Intention to wage war — Seizure by enemy's government of property of its own subject — Validity of insurance — Public policy.

Where a subject of a foreign government insures treasure with British underwriters against capture during its transit from the foreign state to this country, and the foreign government seizes the treasure during the transit, and war is afterwards declared between the foreign and the British governments, the insurance is valid, and an action may be maintained in this country against the underwriters after the restoration of peace, though the seizure is made in contemplation of war, and in order to use the treasure in support of the war.

The important date is the seizure before the declaration of war.

Such an insurance is not against public policy.

Public policy is not a safe or trustworthy ground for legal decision.

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The decision of the Court of Appeal, [1901] 2 K. B. 419, 70 L. J. K. B. N. S. 881, 49 Week. Rep. 660, 85 L. T. N. S. 104, 17 Times L. R. 604, 6 Com. Cas. 198, affirmed.

(August 5, 1902.)

THE respondents, a company registered under the law of the South African Republic, in August, 1899, insured, with the appellant and other underwriters, gold against (*inter alia*) "arrests, restraints, and detainments of all Kings, princes, and people," during its transit from the gold mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the government of the South African Republic. On October 11 at 5 P. M. a state of war began between the British government and the government of the Republic. At the time of the seizure war was admitted to be imminent.

The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside the Republic and were not subjects thereof.

The respondent company having brought an action against [485] the appellant upon the policy, it was agreed between the parties that the action should be treated as if brought at the conclusion of the war, and that the Blue Book might be referred to for evidence as to the facts. The action was tried without a jury before Mathew, J., who held that the appellant was liable. [1900] 2 Q. B. 339, 69 L. J. Q. B. N. S. 771, 48 Week. Rep. 619, 83 L. T. N. S. 79, 16 Times L. R. 438, 5 Com. Cas. 296. This decision was affirmed by the Court of Appeal (A. L. Smith, M.R., and Romer, L.J., Vaughan Williams, L.J., dissenting). [1901] 2 K. B. 419, 70 L. J. K. B. N. S. 881, 49 Week. Rep. 660, 85 L. T. N. S. 104, 17 Times L. R. 604, 6 Com. Cas. 198.

Lord Robert Cecil, K.C., and **J. A. Hamilton**, K.C., for the appellant. The gold was seized for the purpose of waging war against this country, and a contract of indemnity against such a loss is invalid. It is clear that it would be so if the words of the policy expressly applied to such a case. But general words will not make binding a contract which in direct terms could not be enforced. The contract here is one whereby

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it is sought to make a British subject liable for losses inflicted on an alien enemy by his own government. Such a contract—the performance of which would obviously tend to diminish the stress of war for the benefit of an enemy—is one to which our courts will not give effect. Neither directly nor indirectly is it lawful for a British subject to aid an enemy. Suppose a British financier had agreed to lend money to the Transvaal government for war preparations, or for the equipment of an army threatening Natal; or an engineer was engaged to destroy bridges in our colonies; or an underwriter had insured foreign ships which were seized by the country at war with us,—in any such case would our tribunals enforce the contract? The respondents were alien enemies when the gold was seized. They were a corporation under the laws of the Transvaal, and as much a subject of the South African Republic as any individual could be. The corporation is distinct from its members; its status is not modified by the alleged fact that many or most of its shareholders are British subjects. The principle is well stated by Story, J., in *Society for the Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, 131, Fed. Cas. No. 13,156. The headnote is: "There is no [486] legal difference as to the plea of alien enemy between a corporation and an individual;" and the judge says: "Where a corporation is established in a foreign country by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile it may, for some purposes at least, be clothed with the same character." The contract is void whether or not it was made in contemplation of war. It is not necessary that war should actually have broken out. In *Furtado* v. *Rogers* (1802) 3 Bos. & P. 191, 196, 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125, Lord Alvanley, Ch. J., and his colleagues held that an insurance effected in Great Britain on a French ship before the commencement of hostilities between England and France did not cover a loss by British capture; and that no subject could enter into a contract to do anything which might be detrimental to the interests of his own country. To the same effect is *Gamba* v. *Le Mesurier* (1803) 4 East, 407, 7 Revised Rep. 590. That the actual declaration of war is not the decisive period is shown by several prize cases before Sir William Scott. *The Herstelder*

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(1799) 1 C. Rob. 116, where hostilities against the Dutch having begun on September 15, 1795, the country was considered to have been an enemy during "the doubtful state of things;" and see *The Danckebaar Africaan* (1798) 1 C. Rob. 107, and *Touteng* v. *Hubbard* (1802) 3 Bos. & P. 291, 6 Revised Rep. 791. To the like effect are *The Boedes Lust* (1804) 5 C. Rob. 233, 244. *The Jan Frederick* (1804) 5 C. Rob. 128, 132, and *Esposito* v. *Bowden* (1857) 7 El. & Bl. 763, 779, 27 L. J. Q. B. N. S. 17, 3 Jur. N. S. 1209, 5 Week. Rep. 732, 24 Eng. Rul. Cas. 399. There Willes, J., in giving the judgment of the Exchequer Chamber, thus expresses the whole principle involved: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal." Thus the contract is void whether made in contemplation of war or not. If the general words imply such a liability, they must be read as subject to a proviso "that the [487] law of the country to which the insurer belongs be not contravened." *Kellner* v. *Le Mesurier* (1803) 4 East, 396, 402, 7 Revised Rep. 581, 1 Smith, 72. So *Brandon* v. *Curling* (1803) 4 East, 410, 417, 7 Revised Rep. 592, 1 Smith, 85; *Aubert* v. *Gray* (1861–2) 3 Best & S. 163, in the Exchequer Chamber, at pp. 169, 182, 32 L. J. Q. B. N. S. 50, 9 Jur. N. S. 714, 7 L. T. N. S. 469, 11 Week. Rep. 27, 14 Eng. Rul. Cas. 139, overruling *Conway* v. *Gray* (1809) 10 East, 536, 12 Revised Rep. 362, note, 15 Revised Rep. 615, note.

[They also referred to *West Rand Central Gold Mines, Limited* v. *De Rougemont* (1900) 5 Com. Cas. 296, [1900] 2 Q. B. 339, 69 L. J. Q. B. N. S. 771, 48 Week. Rep. 619, 83 L. T. N. S. 79, 16 Times L. R. 438.]

Lawson Walton, K.C., and **Carver**, K.C. (**Scrutton**, K.C., with them), for the respondents. The loss of the gold was within the express words of the policy caused by arrests of princes or peoples. It is for the appellant to show why the terms of the contract should not be strictly enforced. The construction of the appellant would be an undue extension of the authorities by which the insurance of alien enemies is forbidden. The original

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foundation of the rule was not public policy, but the primitive conception of war which imputed mutual hostility to the individual subjects of belligerent powers. Thus, in *The Hoop* (1799) 1 C. Rob. 196, all private trading with the enemy was declared to be illegal without the King's license: *Ex natura belli commercia inter hostes cessare non est dubitandum.* The matter was doubtful in Lord Mansfield's time, and the rule was only gradually introduced into the common law as an importation from Admiralty. See *Potts* v. *Bell* (1800) 8 T. R. 548, 5 Revised Rep. 452, 2 Esp. 612, 2 Eng. Rul. Cas. 654; *Bristow* v. *Towers* (1794) 6 T. R. 35, 3 Revised Rep. 113, note. Insurance was only illegal because all trade between the subjects of the belligerent powers was prohibited. But a condition of actual war was absolutely essential. Hall's International Law, § 126, p. 405, 4th ed.; Park on Insurance, vol. i. p. 520, 8th ed. In Arnould's Marine Insurance, vol. i. § 85, 7th ed., it is laid down that all goods may be insured except those of alien enemies actually engaged in hostilities. There is no ground or authority for any enlargement of the exemption; and subject to it, the property both of subjects and aliens may be insured. See Phillips on Insurance, vol. i. par. 223; Duer on Insurance, vol. i. p. 414. The appellant is [488] creating a new state of things not recognized by the law,—a sort of penumbra of war. There is no foundation for the language of Vaughan Williams, L.J., that the enforcement of such a contract "increases the resources of the foreign country for the expected war." The illustrations of the destruction of property for strategic purposes and of the seizure of ships are inapplicable; these would constitute acts of war. Nor do the decisions cited of Sir William Scott in prize cases help the appellant; the property of the alien enemy was in the possession of the court. *The Boedes Lust* (1804) 5 Ch. Rob. 233, at p. 248; the court "decides upon the character of the property seized and on the nature and quality of the seizure." So, in *Campbell* v. *Innes* (1821) 4 Barn. & Ald. 423, 23 Revised Rep. 238, it was not the insurance which *per se* was invalid; but the action was held not to be maintainable because of the suppression of the fact that the insured was an American subject. In *Bell* v. *Gilson* (1798) 1 Bos. & P. 345, 354, 4 Revised Rep. 823, Buller, J., said he had had many conversations with

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Lord Mansfield, who thought it was a good thing to promote insurances of enemy's property. In *Henkle* v. *Royal Exchange Assurance Co.* (1749) 1 Ves. Sr. 317, 320, Lord Hardwicke said: "No determination has been that insurance on enemies' ships during the war is unlawful; it might be going too far to say all trading with enemies is unlawful." *Esposito* v. *Bowden* (1857) 7 El. & Bl. 763, 779, 27 L. J. Q. B. N. S. 17, 3 Jur. N. S. 1209, 5 Week. Rep. 732, 24 Eng. Rul. Cas. 399, only deals with the state of things after the declaration of war.

Public policy is a very insecure justification of breach of contract. In *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* [1894] A. C. 535, at p. 553, Lord Watson said: "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal." See also Jessel, M.R., on the "paramount public policy" of not lightly interfering with freedom of contract. *Printing and Numerical Registering Co.* v. *Sampson* (1875) L. R. 19 Eq. 462–465, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696. The real policy and interest of the country are that trade should be unrestricted until the actual outbreak of war. Times of [489] strained relations with other powers are frequent. It would be intolerable if on such occasions—of which the Fashoda incident is an example—trade should be suspended. Moreover, the authorities only refer to independent sovereign states. The Transvaal was not such a state; and if these doctrines are to be applied here, they would have to be enforced in the case of a tributary state in India, a colony, or a disturbance in Ireland. The many kinds now known of more or less subordinate states did not exist at the beginning of the last century; and it would be highly dangerous to extend these rules in accordance with the appellant's argument.

The whole argument is in fact based upon a legal fiction. The respondents being incorporated according to the law of the South African Republic are described as aliens. Technically the corporation was a subject of the Transvaal; but it was really a fictitious *persona*. The majority of the shareholders were British subjects, and it is they who lose, as the money was being

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exported to pay their dividends. That cannot be public policy by which the result is to inflict heavy loss on British subjects. Far-reaching injury might thus be caused to British enterprise, which has established railway companies in South America and invested its capital in every country in the world.

Lord R. Cecil, K.C., in reply. The prohibition of trading with an enemy except under a Royal license is older than the case before Lord Hardwicke, and was distinctly laid down in the case of *The Ringende Jacob,* decided in 1747, and cited by Sir William Scott in *The Hoop* (1799) 1 C. Rob. at p. 202. It is not necessary to rely on the old unqualified doctrine; but here as a fact there was a general suspension of commercial relations.

The House took time for consideration.

Earl of Halsbury, L.C.: My Lords, in this case the plaintiffs, who had effected a policy at Lloyd's on a large quantity of gold which was being consigned from South Africa to London, sue on this policy, dated August 1, 1899, in respect [**490**] of a seizure by the Transvaal government of the gold in question on October 2 of the same year. There is no doubt that the loss of the gold is covered by the express words of the policy in question, and the defense to the action rests upon the proposition that the policy was an unlawful contract.

It might be the subject of debate whether I am correct in assuming what I assume for the purposes of my judgment, but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal government. I also assume, though this also might be the subject of debate, that both parties to the contract had in their minds, on August 1, the possibility and even the probability of war. The making of the policy and the loss under it both accrued before the breaking out of war, which it is agreed between the parties occurred at 5 o'clock on October 11.

All the judges, with the exception of Vaughan Williams, L.J., have held that the plaintiffs are entitled to recover upon the policy; and if I rightly understand the reasoning of the learned

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Lord Justice, he thinks the policy was in its inception illegal, and would have been equally illegal even if no war had intervened. He does indeed say that there could have been no claim if war had not occurred; but he is mistaken, since the assumed imminence of the war and the seizure by the Transvaal government might have occurred even if war had finally been averted.

The difficulty I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the state, or what public injury, is supposed by him to be involved; but at all events, in whatever sense the learned judge uses this phrase, it is upon this general ground alone that he decides against the plaintiffs.

Now, as I have said, I understand the judgment of Vaughan Williams, L.J., is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest, injurious to the country, inconsistent with public duty, repugnant to the interests of the state, and no doubt there are equivalent phrases to be found in many judgments [491] where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful.

I do not think that the phrase "against public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what Serjeant Marshall said in the first edition of his work on marine insurance a century ago: "To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures,

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and is frequenty nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different, or different decisions to the same, circumstances, as his notions of expedience might dictate."

But I do not think the law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law, learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant [492] here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavored to describe,—that is, a principle of public policy, recognized by the law, which the suggested contract is infringing, or is supposed to infringe.

If this is the true view, it is not difficult to solve the question whether a contract of insurance made before a war and sought to be enforced in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated, it amounts to this,—that the thing done must be in its nature an assistance to the public enemy, and if there be no public enemy there can be no aid given to him. Nor is this a mere question of words: the importance of the whole

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region of public policy involved makes the actual existence of war at the time of the creation of the contract or its fulfilment necessary. I will assume for my present purpose (though I think it might well be debated) that the Transvaal Company did, to quote the language of Vaughan Williams, L.J., "enter into this contract with a view to the imminent war which might or might not break out with Great Britain."

I note that the Lord Justice uses the phrase "imminent," and one is disposed to ask, Does that word represent a principle capable of logical application to the propositions ultimately arrived at? It is notorious that for many years the Transvaal government had been purchasing and storing up arms and ammunition to an enormous extent which could have no other object than a war with this country. Were all the contracts made with British subjects illegal? or with foreigners, breaches [493] of neutrality on the part of countries of which such subjects were supplying arms and ammunition to the expected enemy of the British government? No such principle has ever been affirmed by any lawyer yet, and the principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the state have created the state of war.

Bynkershoek propounds the principle: [His Lordship read a passage from Quæst. juris publici, lib. 1, chap. xxii., beginning, "Præmisi quemadmodum," and ending, "Prohibendum est." The passage is quoted in Marshall on Insurance, 3d ed. p. 30.] Throughout this the actual existence of the public enemy is assumed, and it is, as I have said, no mere technical phrase. It must be the enemy made so by the public authority.

In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended; an alien enemy cannot sue in the courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the courts of either is restored.

The earlier writers on international law used to contend that some public declaration of war was essential, and Valin, writing in 1770, does not hesitate to describe Admiral Boscawen's oper-

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ations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but though it cannot be said that that view is now the existing international understanding, it is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions: "Quand le conducteur de l'état, le Souverain, déclare la guerre à un autre Souverain on entend que la nation entière déclare la guerre à une autre nation. Car le Souverain représente la nation, et agit au nom de la société, entière et les nations n'ont à faire, les unes aux autres, qu'un corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de [494] l'une sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes." (Vattel, Droit des Gens, liv. 3, chap. 5, § 70.)

In *Muller* v. *Thompson* (1811) 2 Campb. 610, 12 Revised Rep. 753, Lord Ellenborough held that the voyage to Königsberg in 1810, though the relations were very strained between this country and Prussia, British ships being actually excluded from Prussia, and it being objected that this was an enemy's port, was lawful inasmuch as no war was declared and no act of hostility committed,—we could not be said to be at war, which alone could render the voyage unlawful.

Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful; but the words, "King's enemies," are a necessary feature of the last proposition.

Substituting the word "aliens," who may possibly or even probably become the King's enemies,—and in this case the loss and the policy were both before there were any persons who could answer to that description,—it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war, and war alone, that makes trading illegal.

I think no more striking example of the mischief which might result from so loose a mode of applying the principle of public policy in courts of justice could be found than the example which elicited Serjeant Marshall's protest, which I have quoted above.

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Lord Mansfield had expressed the opinion that it was good policy to permit an insurance by British underwriters of enemies' goods, because we might obtain more in premiums than we should lose by capture; but this, in my view, was plainly wrong, and Valin, followed by Pothier and Emergon, denounced such insurance, and said that by the English practice one part of the nation was restoring them by insurance what another part took from them by arms.

If it were competent to a court of law to consider the question which Vaughan Williams, L.J., propounds upon principles [495] of public policy, apart from the known and ascertained rule that intercourse between nations at war is forbidden (which, for the reasons I have given, I think it is not), I should answer the question in a different way from that at which he arrives. Instead of a known and ascertained rule which makes it clear whether a contract is unlawful or not, each of the contending parties to a contract must look all round the political horizon, and form a judgment whether in some one or more contingencies the fulfilment of it may be injurious to his own country in the event of war; and I note here again the word "imminent" finds a place in the learned judge's question. It seems to me that the hindrance done to the free commercial intercourse between nations would be far more injurious to the interests of both than the injury the learned judge suggests.

But further, as the learned judge himself points out, the question depends not on what afterwards takes place, but on whether the supposed contract is illegal in its inception. The learned judge says: "The accident of no war occurring would merely prevent any claim arising, but would not affect the legality of the contract or its construction." I think the learned judge is mistaken here, because the Transvaal government might have seized the gold although no war had taken place; but the proposition is one which discloses the impolitic nature of such a principle. The courts would have to consider whether war was probable or "imminent," and the contract would have to be regarded as illegal, not because war occurred, but because war was likely to occur. I cannot imagine worse public policy than this.

My Lords, for these reasons I think this appeal should be dismissed, and I only desire to add that the authorities referred

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to in the argument do not justify the proposition that expected wars render a contract illegal between citizens of the two nations between whom war is anticipated, and to lay down such a rule would be to establish an entirely new code for which there is no authority in the law.

My Lords, I conclude by reading the words of Parke, B., on this subject when advising your Lordships' House in [496] *Egerton* v. *Lord Brownlow and Others* (1853) 4 H. L. Cas. at p. 123: "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from textwriters of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

It is not necessary to go through all the principles of law which may make a contract altogether illegal. As a wagering contract is illegal, so wills creating a perpetuity have no operation in that respect, but it is enough for the purpose I have in hand. They are defined legal principles, known to and absolutely fixed as part of our law, and a judge is called upon to bring the instrument he has to construe to the test—whether it is or is not within such principles; but I do not think he has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognized by the law.

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To apply what I have said to this case, I do not deny that a judge has a right to consider whether the thing incriminated is an adherence to the King's enemies, or something calculated to assist them; but I do not think we are at liberty to consider [497] whether the contract might be against public policy because one of the parties to it might become an alien enemy afterwards.

For these reasons I move your Lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed, with costs.

Lord Macnaghten (read by Lord Davey): My Lords, I assume that the corporation, which was plaintiff in the action and is now respondent here, was to all intents and purposes in the position of a natural-born subject of the late South African Republic. I do not think it can be entitled to any exceptional favor or to any peculiar indulgence by reason of the fact, if it be a fact, that the bulk of its shareholders were of European nationality. If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien.

I assume, further, that the seizure which has given rise to the claim on which the action is founded was made by the government of the South African Republic in immediate contemplation of war with this country, which that government was then determined at all hazards to bring about unless this country would submit to conditions which no sovereign state with a particle of self-respect could entertain.

Notwithstanding these assumptions, and notwithstanding the very able argument of the learned counsel for the appellants, it seems to me to be perfectly clear that there is no defense to the action.

I think the learned counsel for the respondent was right in saying that the law recognizes a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other,—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. It is not, I think, for private individuals to pronounce upon the foreign relations of their Sovereign or their

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country, and to measure their own responsibilities arising [498] out of civil contracts with foreigners by a standard of public policy which they set up for themselves, even though their views may be right in the abstract and might possibly find acceptance with a jury of their countrymen if such a question were within the competence of such a tribunal. Public policy, in my opinion, requires a good citizen in matters of this sort to conform to the rule and guidance of the state. However critical may be the condition of affairs, however imminent war may be, if and so long as the government of the state abstains from declaring or making war or accepting a hostile challenge, there is peace,—peace with all attendant consequences,—for all its subjects.

The result, therefore, in the present case is that, however hostile the intentions of the South African Republic may have been at the moment when this gold was seized, the seizure must be treated as a seizure in time of peace between the Republic and this country.

The event which happened was within the terms of the policy, and there is no ground on which the underwriters can dispute their liability.

The appeal, I think, must be dismissed, with costs.

My noble and learned friend Lord Shand concurs in this opinion.

Lord Davey: My Lords, I do not think it necessary to state the facts of this case, or to discuss in any detail the numerous cases which were cited in the course of the argument. I should, if I were to do so, be only troubling your Lordships with a repetition of what has been said, and I believe will be said, by my noble and learned friends. I will content myself by stating concisely how the case presents itself to my mind and the conclusion to which I have arrived.

I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy. I also assume, in accordance with the decision in *Aubert* v. *Gray* (1861) 3 Best & S. 163, 32 L. J. Q. B. N. S. 50, 9 Jur. N. S. 714, 7 L. T. N. S. 469, 11 Week. Rep. 27, 14 Eng.

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Rul. Cas. 139, that the loss occasioned by the embargo [499] placed on the goods by the assured's own government might, in ordinary circumstances, be recovered on the policy.

My Lords, there are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, *i. e.*, a person owing allegiance to a government at war with the King, without the King's license. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace.

In the present case the third rule would have constituted a defense to the present action; but the parties, being desirous to obtain a decision on the merits of the case, waived the objection. I have some doubt whether it was competent for the parties to take this course, for it humbly appears to me that, the objection being one based on considerations of public policy affecting the Sovereign, his courts should be held bound to take notice of the plaintiff's inability to sue, and I do not think that this observation is inconsistent with *Flindt* v. *Waters* (1812) 15 East, 260, 13 Revised Rep. 457. But the point is now happily academic, and I do not desire to make it a ground of judgment.

[500] Your Lordships will have observed that, in each of the rules on this subject which I have endeavored to formulate, the

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actual commencement of hostilities is made the time when and the occasion on which the rule comes into operation. The learned counsel for the appellant has endeavored to persuade your Lordships to extend their operation to a period when the relations between two governments are strained and war is imminent, though the peace has not been broken and negotiations are still continued, on the grounds that the same principles of public policy are as applicable to such a state of things as to a time of actual hostility. In the case before us he says that the seizure of the gold by the government of the South African Republic was in contemplation of and with a view to the eventuality of war. The seizure of the gold, however, was not in itself an act of hostility against this country.

My Lords, I am not disposed to agree to such an extension of the law, which appears to me to be unsupported by any authority. Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline. On the one hand, such an extension of the law as your Lordships are invited to lay down would certainly lead to interference with the lawful contracts and commercial pursuits of the King's subjects. It might conceivably precipitate a state of war which it was the object of statesmen to avert; and I think there is great force in the observation made by Romer, L.J., as to the difficulty of determining the intention of a foreign government, and the embarrassment which might ensue from our courts being obliged to decide a question of that kind as one of fact. I quote the following passage from the judgment of the learned Lord Justice: "I think the intention of a foreign government at any given time ought by these courts, for such a purpose as that which I am now considering, to be treated as conclusively determined by the way in which our government chooses or has chosen to deal with that foreign government, and that where our government has not treated the foreign government as being hostile at a particular time, our courts ought not to try and ascertain what was then in the minds [**501**] of the King, President, or responsible ministers, or authorities of the foreign government."

Against these considerations is to be set only the possible but somewhat remote advantage to our government which might ac-

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crue from the enforcement of the rule contended for by the appellant.

My Lords, I prefer to abide by the limits of the law as laid down in the decided cases and by the text writers, and I therefore think that the decision of Mathew, J., and the Court of Appeal should be affirmed.

Lord Brampton (read by Lord Lindley): My Lords, I am of opinion that the respondent is entitled to your Lordships' judgment. At first sight the case may appear to be fraught with difficulty; but when the material facts, which are few and simple, are ascertained and understood, the difficulty will, as I think, be found to be more apparent than real.

The plaintiff is a company incorporated under the laws of the South African Republic for the purpose of working gold mines therein. The majority of its shareholders are subjects of the United Kingdom. The company has an office and a committee of management in England, and it was a custom of the company to transmit to this country gold bullion for sale and distribution of the profits amongst its shareholders. The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders.

In the early autumn of 1899 the company was, in the ordinary course of business, about to send to the United Kingdom a large amount of such bullion, and on August 1 it effected a policy of insurance on its transit from the mines to England with underwriters at Lloyd's, the defendant, a British subject, being one. On October 2 the bullion was placed in the mail train at Johannesburg for conveyance to Cape Town *en route* for its destination. It reached Vereeniging, the frontier station of the Republic, in safety; but on its arrival there it was seized and appropriated by the then government of the Republic, and became totally lost to the plaintiff. When the bullion was so seized there can be no [502] doubt that the friendly relations between this country and the South African Republic were much strained; but both countries were negotiating for a settlement of their differences, and it was not until the afternoon of October 11 that war was declared between them, from which date they continued in open hostility until the end of May, 1902. The action was

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commenced on January 30, 1900, the crucial issue between the parties being whether war had been commenced, or a state of hostility equivalent to a state of war, so far as the insurance was affected, was in existence between the two countries when the seizure was made on October 2, 1899. If the answer was in the affirmative, the plaintiff, as a subject of the Republic, could not recover upon his policy against the defendant, an English subject and an alien enemy of the plaintiffs' country; for, although covered by the words of the policy, it would have been a loss happening during the existence of hostilities, and within the proviso which, according to the language of Lord Ellenborough in *Brandon* v. *Curling* (1803) 4 East, 417, is in all cases considered as ingrafted in every insurance; namely, "that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer." The reason he assigns for this is, "because, during the existence of such hostilities, the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." The law is in other words also explained by Willes, J., in delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden* (1857) 7 El. & Bl. 779: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal." If, however, the answer to the issue between the parties ought to be, as I think it was, rightly found by Mathew, L.J., in the negative, the plaintiff company was clearly entitled (subject to a point which was waived) to [**503**] recover its loss from the defendant; for both the making of the contract of indemnity and insurance and the loss by seizure—which was simply an outrage by the Republic upon its own subject—occurred before the declaration of war. By way of defense it was urged that the seizure of the bullion by the government of the Republic was incidental to actual or expected hostilities against her Majesty Queen Victoria, and for the purpose of supplying the Republic with funds to levy war upon her Majesty, and

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that, coupled with the actual declaration of war which followed, created a state of hostility against her Majesty, and rendered the plaintiff's claim for indemnity contrary to public policy and irrecoverable.

This contention, though very ingenious and exceedingly well argued by the learned counsel, affords, in my opinion, no bar to this action. It was an endeavor to extend the well-established principle described by Lord Ellenborough so as to meet the circumstances of this case, in which undoubtedly hostile intentions were made manifest by word and by action during the time negotiations for peace were being carried on, though no declaration or act of war was made or done until after the British government had signified by silence, on October 11, the nonacceptance of the ultimatum of the Republic received on the previous day. No decided authority supporting this contention was cited to your Lordships, while, in my opinion, reason and good sense are against it.

Every prudent government naturally endeavors and takes steps to place itself in a condition to uphold its own country in the possible event of a state of hostility arising with any other power, and it would indeed be strange that a declaration of war should be held to have relation back to an indefinite period of time during which both the hostile countries believed themselves to be and conducted themselves towards each other as in a condition of amity, and were negotiating with a view to avoid any rupture of a then existing state of peace. I do not think it necessary to say more.

In my opinion the judgments of Mathew, L.J., and of the majority of the Court of Appeal ought to be upheld, and this appeal dismissed, with costs.

[504] **Lord Robertson:** My Lords, the fullness with which this very interesting case is being discussed by some of my noble and learned friends may absolve me from saying more than a few words. I agree that the appeal ought to be dismissed, but I wish to rest my concurrence on one definite ground; namely, that at the date of the seizure the South African Republic was not at war with Queen Victoria. That this company was a Transvaal subject, and that the nationality of its shareholders is immaterial;

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that the gold was seized as sinews of a war against Great Britain intended by the seizers and morally inevitable; these propositions I accept as the conditions of the argument; and it is obvious that the circumstance that this gold was insured lessened *pro tanto* the pressure of the war once it broke out.

But then the question is, Does this state of facts bring the case within any prohibition of the common law? Now, after very careful consideration of this question and with a high appreciation of the judgment of Vaughan Williams, L.J., I am satisfied that, near as in every sense the state of things at the time of the seizure was to war, it is yet separated from it by a line of the sharpest and most definite kind. It cannot be affirmed that at the moment in question there was a state of war between this country and the Transvaal. That the Transvaal was a future enemy, an intending enemy, that she was arming, and that this seizure was an act of arming,—all this I assume and I believe; and if the principle of the cases about actual war really involved cases of impending war, I should not be deterred by the absence of any former decision from applying it. But for the purposes of the present question there are, as it seems to me, but two categories,—war and not war; and the difference between the two things is essential. The present case is perhaps as strong a case as can occur, but in it war was still a contingency or futurity. To extend the law's prohibition of trading with the King's enemies to future or contingent enemies would be subversive of the broad and palpable distinction between peace and war, would be unworkable in practice, and productive of endless uncertainty and loss. I mention these considerations not as if we were here as [505] legislators, or had to decide upon a balance of general considerations. But the question whether it is workable or salutary is one of the tests of any legal doctrine, and I am satisfied that the law against trade with enemies is inapplicable to the events now in question.

Lord Lindley: My Lords, I will not detain your Lordships by recapitulating the facts of this case. I will only ask your Lordships to bear in mind that the policy was effected and the loss of the goods insured took place before war was declared or broke out. These facts are of cardinal importance.

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Before considering the legality or illegality of the policy, it is desirable to consider the legal position of the company assured by it. The company was incorporated and registered according to the laws of the Transvaal, and it carried on business there. It had gold mines there and extracted gold from them, and sent such gold to England or Europe for sale and division of profits amongst its shareholders. It had also a London office and London committee of management. For all purposes material for the determination of the present appeal the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country. See the American case of *Society for the Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 105, Fed. Cas. No. 13,156. If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war, that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. *M'Connell* v. *Hector* (1802) 3 Bos. & P. 113, 6 Revised Rep. 724. Again, the subject of a state at war with this [**506**] country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses. *Wells* v. *Williams* (1698) 1 Ld. Raym. 282, 1 Salk. 46. As observed by Sir William Scott in *The Yonge Klassina* (1804) 5 C. Rob. 302, 303: "A man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively, in those countries. That he has no fixed counting-house in the

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enemy's country will not be decisive." See also *The Portland* (1800) 3 C. Rob. 41.

I pass now to consider the seizure and its effect on the rights of the assured against the underwriters.

The risk of loss by seizure by a foreign government was clearly insured against in the sense that the general words of the policy covered such a risk. But even if this particular risk is one which cannot be lawfully insured against, the fact that the general words cover it does not render the policy illegal *ab initio;* the only consequence is that the general words must be read as subject to an implied proviso that they are not intended to cover and do not cover any risk against which it is unlawful to insure. Therefore, if the seizure in question could not be lawfully insured against, the general words ought not to be held to cover it. This rule for dealing with general words in policies of insurance was formulated and acted upon in *Furtado* v. *Rodgers* (1802) 3 Bos. & P. 191, 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125 and *Kellner* v. *Le Mesurier* (1803) 4 East, 396, 7 Revised Rep. 581, 1 Smith, 72, and has been recognized ever since. In those cases it was held that general words did not cover loss by capture by British forces of an enemy's goods insured before war broke out.

The policy being effected before war broke out, it is not invalid upon the ground that it was when made a contract with a then alien enemy; nor can it be treated as an invalid contract *ab initio* by reason of the generality of its terms. This was in fact conceded by the counsel for the appellants in [**507**] his reply. The question then is reduced to this: Is the seizure in question one which it is unlawful to insure against?

My Lords, one ground, and one ground only, is invoked to show that it is, and that ground is the ground of public policy. A contract or other transaction which is against public policy, *i. e.,* the general interest of this country, is illegal (1853) 4 H. L. Cas. 161, 195, 196, 23 L. J. Ch. N. S. 348, 18 Jur. 71, 24 Eng. Rul. Cas. 118; but public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson, B., and Parke, B., in *Egerton* v. *Brownlow* (1853) 4 H. L. Cas. 106, 123.

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The seizure of the gold in the present case was a distinct gain to the captors. To indemnify the owner of the gold against the loss of such gold is clearly a benefit to the owner, and such an indemnity is a benefit to a person who is regarded as an enemy as soon as war breaks out. But he was not an enemy when the policy was effected nor when the gold was seized, and how it can be against the policy of this country to keep faith with him when the war is over I fail to see. He cannot, of course, sue in this country during the war if the defendants raise that objection; but they do not. The contention is that if the war were over this action could not be maintained.

Reference was made in the argument to such cases as *The Jan Frederick* (1804) 5 C. Rob. 129, and *The Boedes Lust* (1804) 5 C. Rob. 233, to show that contracts made before war breaks out, but in contemplation of it, for the protection of enemy's property against British capture, will not be recognized in this country. This is intelligible enough; for to recognize such contracts would be to defeat the object of this country in effecting the capture. It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces. Anything which would produce, or be calculated to produce, such an effect as that would be clearly against public policy, and be judicially dealt with accordingly. I am unable myself to bring the present case within this principle. The view that public policy requires an extension of rules already recognized so as to meet the present case has been very clearly presented by Vaughan [**508**] Williams, L.J., in his judgment. I am unable, however, to arrive at the same conclusion. His view appears to me to be based on the doctrine which identifies every subject of a state with its own government.

This doctrine was no doubt laid down in *Conway* v. *Gray* (1809) 10 East, 536, 12 Revised Rep. 362, note, 15 Revised Rep. 615, note, and so long as that case stood there was authority for the proposition that an ordinary policy of insurance does not cover a loss occasioned by the seizure of the assured property by the government of the country of the assured. But even before 1861 this doctrine can hardly be said to have been regarded as settled law; it has never been accepted in America. The subject was carefully examined in the 2d edition of Arnould on

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Insurance, vol. ii. pp. 803 et seq., and in 3 Kent's Commentaries, vol. iii. pp. 292 et seq. In 1861 *Aubert* v. *Gray*, 3 Best & S. 163, finally repudiated any such general doctrine in this country. It was, however, unnecessary in that case to decide whether such a seizure would be covered by a policy if the seizure occurred during or in contemplation of war with this country. The court left this point open; but *Conway* v. *Gray, supra,* does not cover it, for the embargo there in question was not an act of hostility.

A seizure after war has broken out is very different from a seizure before war has been declared or has actually commenced. It appears to be settled that a British subject cannot, even before war, insure a person against any loss sustained by him after the war began and whilst he is an enemy of this country. See *Furtado* v. *Rodgers* (1802) 3 Bos. & P. 191; 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125, and *Brandon* v. *Curling* (1803) 4 East, 410, 7 Revised Rep. 592, 1 Smith, 85. Those were cases of capture after war, by the British forces in the first case, and by our allies in the second case; and these authorities go far to show that if the seizure here had been after war had broken out the policy would not have covered such a loss.

But, apart from *Conway* v. *Gray, supra,* and others based upon the doctrine there laid down and now exploded, there is no authority for saying that an insurance effected before war does [509] not cover a seizure of the insured property by the government of the assured in time of peace, even if war with this country is imminent and shortly afterwards breaks out between that government and our own.

In Arnould on Insurance, vol. i. p. 135, 6th ed., it is stated generally: "Where the party intended to be insured by the policy does not become an alien enemy until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities, and revives on the restoration of peace." For this is cited *Flindt* v. *Waters* (1812) 15 East, 260, 13 Revised Rep. 457, which warrants the author's statement.

That case is also useful as showing that, where the insurance is legal in its inception and the loss occurs before war, an action on the policy may be successfully brought even during war if the underwriter does not put on the record a special dilatory plea.

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The case is an authority for the course taken in this case of obtaining a decision of the controversy between the parties on its merits without waiting for the termination of the war. The general rule laid down in Arnould is a sound intelligible working rule, and covers the present case.

I agree with Vaughan Williams, L.J., in thinking that *Aubert* v. *Gray* (1861) 3 Best & S. 163, 32 L. J. Q. B. N. S. 50, 9 Jur. N. S. 714, 7 L. T. N. S. 469, 11 Week. Rep. 27, 14 Eng. Rul. Cas. 139, does not quite cover this case; but I cannot agree with him in thinking that public policy requires that this action should be decided in favor of the underwriters.

War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal license, and dissolves all contracts which involve such trading. See *Esposito* v. *Bowden* (1857) 7 El. & Bl. 781, et seq. 27 L. J. Q. B. N. S. 17, 3 Jur. N. S. 1209, 5 Week. Rep. 732, 24 Eng. Rul. Cas. 399. But threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyze commerce, and often without any real necessity. Is it for the interest of this country to dislocate trade because international relations are strained and war appears probable to the public, who do not know and cannot know the real views and resolutions of the governments concerned? It must be [**510**] remembered that contracts of insurance are not by any means the only contracts which have to be considered in this connection; what affects them affects contracts of sale and contracts of carriage both by land and sea, and in fact affects the whole external commerce of the country. Romer, L.J., saw this, as is apparent from his judgment.

My Lords, where a policy of insurance is not void *ab initio*, and a loss from one of the perils insured against happens before war is declared or breaks out, what defense can be offered to an action upon it? I know of none except where the loss is occasioned by British capture followed by war. Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country. *Le Bret* v. *Papillon* (1804) 4 East, 502, 7 Revised Rep. 618. Your Lordships are asked to invent a new de-

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fense unheard of before, and to say that every policy on a foreigner's property abroad is subject to the implied condition that it shall not be seized by his own government in order to be used against this country if war breaks out. Such a doctrine, I venture to think, would paralyze legitimate trade and be entirely against the interests of this country.

In my opinion the order and judgment appealed from should be affirmed and the appeal be dismissed, with costs.

Order of the Court of Appeal affirmed and appeal dismissed, with costs.

Lord's Journals, August 5, 1902.

Solicitors: *Waltons, Johnson, Bubb, & Whatton; Wm. A. Crump & Son.*

Note.—Marine insurance: validity of insurance of enemy property against seizure.

The English authorities on the question above stated are summarized in 17 Laws of England (Halsbury) 429, as follows: "As regards insurances effected by alien enemies, the following propositions have been firmly established by judicial decisions:

"Contracts of marine insurance, like other contracts, if entered into with a British subject by or on behalf of an alien enemy during a war with this country, are wholly void and illegal, and cannot be enforced by the assured or his agent. ([Citing] *The Hoop* (1799) 1 Rob. 196, 198, 201; *Furtado* v. *Rogers* (1802) 3 Bos. & P. 191, 199, 200, 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125; *Esposito* v. *Bowden* (1857) 7 El. & Bl. 763, 27 L. J. Q. B. N. S. 17, 3 Jur. N. S. 1209, 5 Week. Rep. 732, 24 Eng. Rul. Cas. 399; and see *Kellner* v. *Le Mesurier* (1803) 4 East, 396, 1 Smith, 72, 7 Revised Rep. 581; *Gamba* v. *Le Mesurier* (1803) 4 East, 407, 7 Revised Rep. 590; *Brandon* v. *Curling* (1803) 4 East, 410, 1 Smith, 85, 7 Revised Rep. 592; *De Luneville* v. *Phillips* (1806) 2 Bos. & P. N. R. 97.) . . .

"On the other hand, insurances, if effected before the outbreak of war by persons who afterwards became alien enemies, are valid and legal contracts, the right of action on which is only suspended during the war and revived upon its close ([citing] *Furtado* v. *Rogers* (1802) 3 Bos. & P. at p. 201, 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125; JANSON v. DRIEFONTEIN CONSOL. MINES; *Harman* v. *Kingston* (1811) 3 Campb. 150, 13 Revised Rep. 775, 14 Eng. Rul. Cas. 232; *Flindt* v. *Waters* (1812) 15 East, 260, 13 Revised Rep. 457; and see *Boulton* v. *Dobree* (1808) 2 Campb. 163; *Shepeler* v. *Durant* (1854) 14 C. B. 582.); . . . but although such insurances are

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legal contracts, they are, on grounds of public policy, not allowed to cover any losses that occur during the war, and are available only as contracts of indemnity against losses which have occurred before commencement of hostilities ([citing] *Brandon* v. *Curling* (1803) 4 East, 410, per Lord Ellenborough, Ch. J., at p. 417, 1 Smith, 85, 7 Revised Rep. 592; *Gamba* v. *Le Mesurier* (1803) 4 East, 407, 7 Revised Rep. 590; *Kellner* v. *Le Mesurier* (1803) 4 East, 396, 1 Smith, 72, 7 Revised Rep. 581 (loss by British capture); JANSON v. DRIEFONTEIN CONSOL. MINES). . . .

"The fact, however, that war is expected and imminent will not free the insurer from liability for loss of property by seizure, even if it be seized by a government for the purposes of a war which it is on the point of declaring, and even though the insurance was intended to protect the property against such seizure ([Citing] JANSON v. DRIEFONTEIN CONSOL. MINES, per Lord Halsbury, L. C., at pp. 491, et seq.).

"As a general rule, whenever any property is, according to prize law as administered by the courts of this country, liable to British capture, the insurance in this country on such property is illegal and void. It may be liable to British capture on many various grounds, —for instance, because it is enemy's property, or contraband carried to a hostile country, or because the ship is employed in violation of the law of blockade by the British government or its allies, or is engaged in carrying enemy's troops, or in any other manner which is considered by the prize law of this country to be illicit or illegal."

Apparently the only American case bearing upon the question is *Merchants' Ins. Co.* v. *Edmond* (1866) 17 Gratt. 138, where it was held that there is nothing illegal in a policy of insurance issued at a time when the underwriters and insured were alike citizens of Virginia and the United States, as applied to capture by the forces of the United States government upon the breaking out of the Civil War. On this point the court said: "This commercial adventure, when begun, was entitled to the favor of the United States government. Nothing afterwards occurred to make it unlawful. It is true that a blockade of the ports of Virginia had been proclaimed by the President of the United States, as Commander In Chief of the Army and Navy of the United States, and that the legality and obligation of that Proclamation have been vindicated and sustained by many decisions of the Supreme Court. It thus became unlawful for the master of the Sally Magee to violate that blockade; and any voyage with the purpose to do so would have been unlawful, and might have defeated the insurance or any other necessary incident of that interdicted voyage. Nevertheless, an actual notice of the blockade, and attempt or design to run it, would have been necessary to taint this policy with unlawfulness, and to convict the parties to it of a breach of their public duties. But it is adequately shown by

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the agreement in this cause, and the case of *The Sally Magee* (*Fry* v. *United States*) (1865) 3 Wall. 457, 18 L. ed. 199, that the master of the vessel never had notice of either the war or the blockade previously to his capture, and entertained no design whatsoever of disobeying the President's proclamation. The voyage then was not unlawful; the vessel 'cleared from Rio de Janeiro, with United States papers and under the United States flag, for Richmond, Virginia, or some other Atlantic port of the United States.' These parties, then, were not implicated by this policy in any violation of law,—no new duty had arisen on their part to supersede their contract, nor could 'any clear, immediate, and certain danger' to their country ensue from its performance. I am at a loss to conjecture how an indemnification of the appellees, for the marine damage sustained by them, could be imputed to them or the insurers, in the language of this authority, as 'a criminal compromise of public duty.' Counsel were pleased to denounce with great vehemence such an insurance, in the supposed circumstances, against the acts of the United States government, as a solecism in terms, and a legal offense not to be countenanced upon the restoration of Federal authority, or in any courts organized under its protection. I can only say, for my part, that I do not contemplate it in such a light; but, on the contrary, hold the recovery in this case to be justified by the decisions of the Supreme Court, as well as by the principles of municipal law which govern this court."

In this connection reference may be made to the case of *Odlin* v. *Insurance Co. of Pa.* (1808) 2 Wash. C. C. 312, Fed. Cas. No. 10,433, in which it was held that a construction of a contract of insurance as indemnifying the insured against loss arising from an embargo which the government to which the parties belonged might at any future time impose, was not inconsistent with the sound policy of the nation, either as creating an interest in the insurer in opposition to the embargo itself, or as having a tendency to induce the violation of the embargo by the insured.

The following decisions are also of collateral interest as dealing with the effect of war on the validity of marine insurance:

In *Richardson* v. *Maine F. & M. Ins. Co.* (1809) 6 Mass. 102, 4 Am. Dec. 92, it was said, in the course of a general discussion of the subject of illicit voyages: "When the sovereign of the country to which the ship belongs shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit, and all insurances on such voyages by his subjects are void, whether the assurers had, or had not, knowledge of the prohibition. For the law will not allow

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any effect to a contract made to protect a traffic which it has prohibited."

In *Barker* v. *Blakes* (1808) 9 East, 283, it was held that insurance on neutral goods while being transported in a neutral ship to a country at war with the country of the insurer was valid. Lord Ellenborough, Ch. J., in ruling against the contention that to allow of a recovery would be to allow of an indemnity being afforded through the medium of British insurance to neutrals acting in contravention of the interest and policy of Great Britain in the carrying of the goods of its enemies, and that in so doing the neutral had in effect violated the duties of his neutrality and assumed a hostile character in respect to great Britain, said: "It does not appear to us that this general objection to the plaintiff's right to recover is well founded. The American was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects; at the risk indeed of having his voyage interrupted by the goods being seized; or of the vessel itself, on board of which they were, being detained, or brought into British ports, for the purpose of search; but the mere act of carrying such enemies' goods on board his vessel constituted no violation of neutrality on the part of the American; nor did the arrest and detention of his vessel, for the purpose of search and eventual condemnation of the goods which might be found on board belonging to the enemy, form any breach of our duty towards the American. The indemnity sought under the policy in this case is not an indemnity to an enemy or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of Great Britain; but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably to a certain decree controlled and interrupted on our part, in the exercise of our rights, as belligerents, against enemies' property found on board the ship of a neutral. These rights, though they are in a degree adverse to each other, do not, therefore, in the exercise of them, necessarily place either party in the situation of an enemy to the other. The various competitions for commercial advantage and superiority, which take place between different nations; their mutual exclusions of each other by their respective municipal regulations,—are so many acts of adverse policy and conflicting rights, exercised towards each other; but they occur without producing any breach of national amity. And it has never yet, in any instance that I am aware of, been held a breach of implied duty in the subjects of either state to lend their assistance, by insurance or otherwise, to such rival or exclusive commerce or interests of the other. Cases of express public prohibition, and that degree of assistance to enemies which constitutes a society in war against any particular state, fall of course under a different consideration, and are necessarily to be understood as interdicted sub-

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jects of insurance in every country to which this species of contract is known. The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was in this case engaged, not being either of a hostile description, nor in any other way expressly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of assurance falls to the ground." E. S. O.

[ENGLISH COURT OF APPEAL.]

IN RE SCOTT, Deceased.

[1901] 1 Q. B. 228.

Also Reported in 70 L. J. Q. B. N. S. 66, 65 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148.

Revenue — Estate duty — Devise to issue of testator — Death of devisee in lifetime of testator — Issue of devisee living at death of testator — Devise taking effect as if devisee had survived testator — Property passing on death — Wills act 1837 (7 Will. 4 and 1 Vict. chap. 26), § 33 — Finance act 1894 (57 & 58 Vict. chap. 30), § 1; § 2, subsec. 1 (a); § 22, subsec. 1 (l), subsec. 2 (a).

A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary real estate to trustees. This devise included the property devised by the father's will, and took effect with regard to it by virtue of the Wills act 1837, § 33. On the death of the father estate duty was paid on all the property which passed on his death, including the property devised to his son. The Commissioners of Inland Revenue claimed in addition estate duty on the last-mentioned property as property passing on the death of the son within the meaning of the finance act 1894.*

On appeal by the trustees against the claim of the commissioners under § 10 of the finance act 1894:—

Held, that the duty so claimed was payable by the trustees.

(December 12, 1900.)

APPEAL from the judgment of a Divisional Court (Darling and Channell, JJ.) upon an appeal by the trustees of the will of John Scott, Junior, against a claim of estate duty under the finance act 1894, by the Commissioners of Inland Revenue.

* These statutory provisions are set forth verbatim in the opinion of Stirling, L.J., post, 850, page 238 of the original report.

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The facts are briefly stated in the headnote and appear at length in the report of the case in the court below ([1900] 1 Q. B. 372, 69 L. J. Q. B. N. S. 121, 64 J. P. 25, 48 Week. Rep. 205, 81 L. T. N. S. 610, 16 Times L. R. 110).

The Divisional Court gave judgment for the Crown.

Joseph Walton, Q.C., and **Edwardes Jones**, for the petitioners. The property in question was not property which passed on the death of John Scott, Junior, nor was it property of which at the time of his death he was competent to dispose, within the meaning of the finance act 1894, § 1; § 2, subsec. 1 (a); § 22, subsec. 1 (l), subsec. 2(a). The wills act 1837, § 33, in order to prevent the intention of testators from being frustrated, [**229**] introduced a fiction, namely, that in cases within the section the devisee or legatee is to be supposed to have died immediately after, though in fact he died before, the testator; but that fiction ought not to be carried beyond the purpose for which it was created. The finance act 1894 contemplates a real passing of property on a real death. It is impossible to say that John Scott, Junior, was competent to dispose of this property on his actual death, except in a sense in which anyone may be said to be competent to dispose of anything, namely, in the sense that, if not subject to disability of any kind, he could dispose of the thing if he had it to dispose of. But that cannot be the sense intended by the finance act. The provision of § 2, subsec. 1 (a) of the finance act 1894, was introduced to meet the case of a person having a general power of appointment over property. At the time of the death of John Scott, Junior, he had no interest whatever in the property; it was the father's property to dispose of in any way he pleased. The wills act 1837, § 33, gave John Scott, Junior, no interest in or power over the property. All that it provides really is that, in order that there may not be a lapse, and for the purpose of passing the property under the will of the testator, the death of the devisee or legatee shall be deemed to have taken place after that of the testator. But that provision has no relation to the purposes of a taxing statute like the finance act 1894. The wills act 1837, § 33, in substance provides that the testator's will shall have a certain effect, namely, as if it contained a clause providing that, if the devisee or legatee die before the testator, the property shall go to the persons to whom

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it would have gone if that had not been the case. The property passes really under the will of the father, not under that of the son, though the will of the son has to be looked at to see to whom it is to go under the father's will. This is not like the case of property over which there is a power of appointment, or which is to vest on a contingency, for in those cases there is an existing interest at the time of death. Here there was none in John Scott, Junior. Suppose, by way of illustration, a son had made a will in his father's lifetime specifically devising property which he expected his father to leave him, [**230**] and then died in the father's lifetime, and the father afterwards, wishing to give effect to the son's will, left the property by will to the person designated by it. Could it be said in such a case that the son was, within the meaning of the finance act 1894, competent to dispose of the property at the time of his death? That case is identical in substance with the present. The chance that someone may leave a person property is not property of which he is competent to dispose. The property in this case is not within the definition of "property passing on the death" given by § 22, subsec. 1 (l), nor was John Scott, Junior, competent to dispose of it within the meaning of § 22, subsec. 2 (a). "Competent to dispose of" means competent by virtue of interest, not competent as regards personal capacity. See *Attorney-General* v. *Hallett* (1857) 2 Hurlst. & N. 368, 27 L. J. Exch. N. S. 89. The case of *Pearce* v. *Graham* (1863) 9 Jur. (N.S.) 568, 1 New Reports, 507, 32 L. J. Ch. N. S. 359, 8 L. T. N. S. 378, 11 Week. Rep. 415, shows that the effect of the wills act 1837, § 33, is not that the child is to be supposed to survive the father for all purposes. The cases as to the effect of the wills act 1837, § 33, with regard to probate duty, such as *Perry's Executors* v. *Reg.* (1868) L. R. 4 Ex. 27, 19 L. T. N. S. 520, 17 Week. Rep. 382, are not in point, for they depend on the well-settled principle that probate duty is payable on everything which the executors take by virtue of the will.

[They also cited *In re Parsons* (1890) 45 Ch. D. 51, 59 L. J. Ch. N. S. 666, 62 L. T. N. S. 929, 38 Week. Rep. 712; *Johnson* v. *Johnson* (1843) 3 Hare, 157, 13 L. J. Ch. N. S. 79, 8 Jur. 77; *Winter* v. *Winter* (1846) 5 Hare, 306; *In the Goods of Parker* (1860) 1 Swabey & T. 523, 31 L. J. C. P. N. S. 8, 6

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Jur. N. S. 354; *Lord Advocate* v. *Bogie* [1894] A. C. 83, 63 L. J. P. C. N. S. 85, 6 Reports, 98, 70 L. T. N. S. 533; *Attorney-General* v. *Brunning* (1860) 8 H. L. Cas. 243, 30 L. J. Exch. N. S. 379, 6 Jur. N. S. 1083, 8 Week. Rep. 362; *In re Hensler* (1881) 19 Ch. D. 612, 51 L. J. Ch. N. S. 303, 45 L. T. N. S. 672, 30 Week. Rep. 482; *Lord Lilford* v. *Attorney-General* (1867) L. R. 2 H. L. 63, 36 L. J. Exch. N. S. 116, 16 L. T. N. S. 184, 15 Week. Rep. 595.]

Sir R. B. Finlay, A.G., and **Vaughan Hawkins**, for the Crown. The Crown does not claim the duty as on a constructive death of John Scott, Junior, after his father's death, but on his actual death. The effect of the wills act 1837, § 33, is that more property passed upon the death of John Scott, Junior, than at first appeared. By the finance act, § 22, subsec. 1 (l), "property passing on the death" includes "property passing either immediately on the death or after any [**231**] interval, either certainly or contingently." John Scott, Junior, was competent to dispose of the contingency of his taking this property at the time of his death, and in the event it appeared that he was competent to dispose of the property, for he did in fact dispose of it by his will. The case is really concluded by the decision in *Perry's Executors* v. *Reg.* (1868) L. R. 4 Ex. 27, 19 L. T. N. S. 520, 17 Week. Rep. 382. It is well settled by the decisions that the effect of the wills act 1837, § 33, is that the property comprised by the devise in the father's will is to be considered in point of law as having vested in the son after the father's death with all the incidents of such a vesting. *Johnson* v. *Johnson* (1843) 3 Hare, 157, 13 L. J. Ch. N. S. 79, 8 Jur. 77; *Winter* v. *Winter* (1846) 5 Hare, 306; *Eager* v. *Furnivall* (1881) 17 Ch. D. 115, 50 L. J. Ch. N. S. 537, 44 L. T. N. S. 464, 29 Week. Rep. 649. But for the wills act 1837, § 33, the property would not have passed to the petitioners. The effect of that section being that it does so pass under the will of John Scott, Junior, it must be considered as passing subject to all the incidents of property so passing. All the arguments for the petitioners were anticipated in *Johnson* v. *Johnson, supra,* and negatived by the decision in that case. It is quite clear upon the authorities that the effect of § 33 of the wills act is not that the property passes direct under the father's will to the persons

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designated by the son's will. *Eager* v. *Furnivall, supra.* It is a long-exploded doctrine that § 33 of the wills act is to be treated as a construction section, like §§ 24–31 of the same act.

[They also cited *Wisden* v. *Wisden* (1854) 2 Smale & G. 396, 18 Jur. 1090, 2 Week. Rep. 616; *Attorney-General* v. *Loyd* [1895] 1 Q. B. 496, 64 L. J. Q. B. N. S. 365, 15 Reports, 227.]

Joseph Walton, Q.C., for the petitioners, in reply.

Cur. adv. vult.

A. L. Smith, M.R., read the following judgment: The point raised in this case is whether a second estate duty is payable to the Crown upon property valued at 80,000*l.* under the finance act of 1894, in the following circumstances: Upon May 4, 1896, John Scott, Junior, whom I will call the [**232**] son, made his will, whereby he appointed the petitioners his executors and trustees, and he devised and bequeathed to them all his residuary real and personal estate in trust, so far as is material, for his daughter Muriel Elsie Scott absolutely. Upon January 22, 1899, the son died, and probate of his will was taken out and all duties then payable upon the son's estate were thereupon paid by his executors to the Crown. John Scott, Senior, whom I will call the father, died about four months after his son,—namely, on May 12, 1899,—leaving a will dated June 5, 1891, by which he devised to his son freehold property in the city of London of the value of 80,000*l.* This estate of the father has been rightly charged with estate duty, it being property which passed upon the death of the father, and this duty has been paid; but the Crown now claims estate duty over again upon this 80,000*l.*, as having also passed upon the death of the son to his devisees under his will of May 4, 1896, although it never did pass to these devisees until four months after the actual death of the son.

It cannot be denied that estate duty under the act may become payable over and over again upon the passing of property upon death at very short intervals of time, and, if the son in this case had died the day after his father instead of dying before him as he did, the 80,000*l.* of property would have been chargeable with estate duty again when it passed upon the son's death to his devisees. But in the present case the son died about four months

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before his father, and it is argued for the executors, the appellants, that the second estate duty which is claimed is therefore not payable under the act of 1894.

I agree that in the act of 1894 the words, "property passing on the death of the deceased," prima facie mean the natural, and not the statutory or artificial, death of the deceased; but there are other words in the act which enlarge the words, "property passing on the death," and which have to be dealt with, and they are these: Sec. 2, subsec. 1—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say, (a) property of which the deceased was at the time of his death competent to dispose." [233] It cannot be denied that property, by virtue of the wills act 1837, to which a deceased is entitled at the time of his death, he is competent to dispose of, although he had it not at the date of his will; nor can it be denied that, if there had been no wills act, there would have been in the present case a lapse of the 80,000*l.* of property, and the son would have taken nothing. I do not agree with Mr. Joseph Walton when he says on behalf of the appellants that the wills act 1837 has nothing to do with the case in hand, for, in my judgment, it has, and it must be looked at to ascertain what it was that the son at the time of his death was competent to dispose of. For instance, it must be looked at to see whether the son was competent to dispose only of property of which he was possessed at the date of his will, as was the case as to real estate before the wills act, or of which he was possessed at the time of his death, which is the case since the passing of the wills act. When ascertaining what real estate he was competent to dispose of, and upon which taxation is to take place, surely the wills act must be looked at, for it plays a very important part in the investigation. Now § 24 of the wills act enacts that every will shall "take effect" as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; in other words, by the wills act a testator is competent to dispose of all the real and personal estate he possesses at the time of his death, and not only, as before the wills act, of the real estate he possessed at the date of his will. This may make a great difference when, for the matter of taxation, it has to be determined, as in this case, what the deceased was compe-

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tent to dispose of; for this is made the subject of estate duty. Again, to see whether the son took anything under his father's will of which he was competent to dispose, the wills act must also be looked at, in order to see whether it has any effect upon what the son was competent to dispose of. And what do we find? We find, by § 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the [234] contrary intention should appear by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no wills act, the son would have had nothing to dispose of. But the wills act enacts that the will of the father shall take effect as if the son had died immediately after his father,—*i.e.*, that, in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the wills act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the act by which the appellants get rid of the lapse enacts that the will of the father shall "take effect" as if the son had died immediately after his father; that is, that the son in this case was competent to dispose of the 80,000*l.* of property, subject to his father revoking his will, which he never did. If the appellants take the benefit of § 33, which they do, and thus obtain the 80,000*l.* of property, they must take the burden also,—*i.e.*, of paying the estate duty chargeable thereon. My brothers Collins and Stirling have shown me their judgments, and, having read them, I need, I think, write no more, excepting to say that I agree in their judgments, and that this appeal must be dismissed.

Collins, L.J., read the following judgment: This case appears to me to present little difficulty when § 33 of the wills act is construed in what seems to me its obvious prima facie meaning, and in accordance with the interpretation which, as I think, it has received through a series of authorities. There is

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no doubt that, under § 1, § 2, subsec. 1, and § 2, subsec. 1 (a), of the finance act, estate duty is payable upon the property in question, if, under the last subsection, John Scott, Junior, was at the time of his death "competent to dispose of it." The property in question could clearly never have been his to dispose of in the events which happened but for the operation of § 33 of the wills act. The property was devised to him by his father, and, as he died in his father's lifetime, the devise [235] would have lapsed, and could not, therefore, have come under any disposition made by him. But it seems to me equally clear that the effect of § 33 of the wills act is to confer upon him a right to dispose of it. It enacts that, in the events which have happened here, the devise of this property in his father's will shall not lapse, but shall take effect as if the death of John Scott, Junior, had happened immediately after that of his father. Now, if John Scott, Junior, had survived his father, he would have taken the property devised and would have been competent to dispose of it. The right to dispose of it would have been an incident of his ownership, and it would have passed under a will made by him before his father's death. Unless all these consequences follow in like manner in the events which have happened here, the devise does not take effect, as the statute says it shall, as if the son had survived his father. What is the effect, then, in view of this legislation, of his actual death having taken place before his father's? Can it be said to deprive him of the benefit which the statute expressly confers upon him, and leave him under the same incapacity to dispose of the property as he would have been under before the act? A will of the same date and in the same terms as that which he actually made would clearly have covered the property in question, had he survived his father; and by the section the devise to him is to have the same effect as if he had survived. It follows that by the operation of the statute he was as to this particular class of property rendered competent to dispose of it as property falling in within the constructive period of his life. His capacity to dispose would end necessarily with his actual life, but as to this class of property his power of controlling it depends upon its falling in before his constructive, not his actual, death. It is said that at the date of his actual death he had no more than a *spes successionis,* which

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is a very different thing from the actual property, and that it is the actual property, and not the *spes successionis,* that he must be competent to dispose of in order to let in the operation of the finance act. But the statute by the fiction of his surviving his father postpones the period during which he may become entitled to property to a date [**236**] after his father's death, and by that time the hope had ripened into a reality. Its effect is to make him competent to dispose in his lifetime of something as to which he had only a *spes successionis* in his lifetime, provided it became a certainty, not as in the case of ordinary property before his natural death, but before the time named in the act It is inherent in the nature of the legislation itself that it cannot be determined at the time of the natural death whether he had or had not the power to dispose of certain property, but by the light of after events we know now that he had. The statute in moving forward the date from which the will speaks to a point of time when he was, in fact, incapable of volition, has really only reapplied to a particular case the general principle of the 3d section, which makes it lawful for every person to dispose by will of property to which he is entitled at the time of his death, "notwithstanding that he may become entitled to the same subsequently to the execution of his will." Thus, efficacy is given to the antecedent disposition subject to an event which cannot be determined till his death, and is not made to depend on any inference of adoption by the testator at the moment of his death of the existing disposition That this is so is evident from the fact that a will made by a person who became a lunatic immediately afterwards, and never recovered testamentary capacity, would carry property to which he did not become entitled till after the execution of the will. Whether he was competent or incompetent to dispose of it when he made the disposition is made to depend on an after event, it becomes a good or bad disposition according to the event, but his competency at the time of making it is not affected. We merely learn by the event whether he was in fact competent or not to control the property by his disposition. The statute might just as well have drawn an arbitrary line at six months after the actual death; and the state of facts then would determine whether any disposition made by the testator as to particular property was effective or not. If

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it turns out to be effective, it must be because he was competent to make it when he made it, which must have been in his lifetime. I am of opinion, therefore, that John Scott, Junior, was at the time [237] of his actual death competent to dispose of the property in question.

But, further, even if the true view of § 3 of the wills act is that, in making the will embrace property falling in up to the death of the testator, it assumes an exercise of volition by the testator, which may never in fact have taken place, after he has become entitled to the property, I see no difficulty in assuming that the same fiction applies in the case of the son who is brought to life again for the purposes of the 33d section; and I should have no hesitation in holding that all fictions incident to conferring upon him testamentary capacity to dispose of the property in question must be included in and covered by the central fiction of his prolonged existence. Thus, then, John Scott, Jr., by virtue of the wills act must be taken as having acquired the property in question with all its incidents, and he was, therefore, competent to dispose of it within the finance act. It is said that a fiction should not be extended so as to let in taxation, but I think full effect must be given to the fiction so as to carry out the purpose of the wills act itself, which was to vest the property in John Scott, Jr., as though he had survived his father. I see no reason why the fiction, which was introduced for the purpose of putting him in the position which his father's will intended him to be placed in, should be held to stop short of imposing the burden which would have been an incident of the property had he lived to claim the gift. Without the fiction his estate would have got nothing. Mr. Walton's main argument, which, as I understood it, was that the wills act merely imposes a particular construction on the father's will as though the provisions of the son's will were set out in it, seems to me to find no foundation whatever in the act, which in terms treats the son as surviving and leaves the supervening rights to be worked out on that footing. Moreover, it seems to me, though he strenuously contended the contrary, that the point is decided by *Johnson* v. *Johnson* (1843) 3 Hare, 157, 13 L. J. Ch. N. S. 79, 8 Jur. 77, followed by *Winter* v. *Winter* (1846) 5 Hare, 306; *Wisden* v. *Wisden* (1854) 2 Smale & G. 396, 18 Jur. 1090, 2 Week. Rep.

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616, and *Eager* v. [238] *Furnivall* (1881) 17 Ch. D. 115, 50 L. J. Ch. N. S. 537, 44 L. T. N. S. 464, 29 Week. Rep. 649, as well as by *Perry's Executors* v. *Reg.* (1868) L. R. 4 Ex. 27, 19 L. T. N. S. 520, 17 Week. Rep. 382, and for the same reason *Lord Advocate* v. *Bogie* [1894] A. C. 83, 63 L. J. P. C. N. S. 85, 6 Reports, 98, 70 L. T. N. S. 533, does not apply. I am of opinion, therefore, that the appeal must be dismissed.

Stirling, L.J.: By § 1 of the finance act 1894, there is imposed in the case of every person dying after August 1, 1894, estate duty "upon the principal value, ascertained," as in the act mentioned, "of all property, real or personal, which passes on the death of such a person." By § 2, subsec. 1, "property passing on the death of the deceased shall be deemed to include," amongst other particulars, "(a) property of which the deceased was, at the time of his death, competent to dispose." By § 22, subsec. 2 (a), "a person shall be deemed competent to dispose of property, "if he has such an estate or interest therein, or such general power as would, if he were *sui juris,* enable him to dispose of the property."

It is contended on behalf of the Crown that, regard being had to the terms of the wills act, § 33, John Scott, Jr., had such a general power as enabled him to dispose of the property devised to him by his father's will, and consequently that this property fell within the terms of § 2, subsec. 1 (a), as being property of which he was at the time of his death competent to dispose. In my opinion this contention is right.

Section 33 of the wills act provides that "where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such device or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." All the conditions referred to in this section occur in the present case.

This section differs in its terms from §§ 24–31 inclusive. In

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these last-mentioned sections the legislature has seen fit to [239] provide that under certain circumstances a particular meaning shall be attributed to certain language which may be found in a will. In §§ 32 and 33 the object of the legislature is to give legal effect in a prescribed manner to certain testamentary gifts which, under the law as it stood at the time of the passing of the act, would have lapsed, *i.e.*, would have altogether failed. Neither in § 32 nor in § 33 does the legislature enact that the will shall be read and construed as if it contained language which is not found in it; in both these sections it is enacted that testamentary gifts of the kind referred to shall not lapse, but shall take effect. The words which follow point out what the effect is to be. In § 33 the effect is to be "as if the death of" the devisee or legatee "had happened immediately after the death of the testator." To ascertain the meaning of this, let me suppose that the testator by his will has (as in the present case) devised real estate in fee to a child who predeceases him. If the child had survived the testator, the will would have passed the real estate to that child in fee; and the legislature prescribes that, notwithstanding the death of the child, the legal effect of the will shall be the same,—that is to say, that the will shall pass the real estate to the child in fee. Such seems to me the natural meaning of the language of the act; nor can I see any difficulty in understanding it. The legislature has simply provided that in certain cases there shall be a posthumous addition to the property of a deceased person, the object of such provision being to place that additional property at the disposal of the deceased while still living.

At this point, in my judgment, the operation of the wills act ceases; and this additional property is left to go and devolve as part of the property of the deceased child. If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as [240] upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trus-

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tee in bankruptcy, and so on. But the wills act does not contain any provision which directly confers any benefit on persons claiming under the child, whether those persons take by act *inter vivos*, or by testamentary disposition, or by operation of law. Still less does it contain any provision in favor of the Crown; and, if the Crown is entitled to estate duty on this property, appropriate language must be found in the finance act. That language I find in § 2, subsec. 1 (a), and § 22, subsec. 2 (a).

I have dwelt on this point at greater length than I otherwise should, because it is my misfortune to find myself in disagreement (or at least apparent disagreement) as to it with the opinion expressed by Channell, J., in the court below. I refer particularly to the passage at page 386 in the report in [1900] 2 Q. B., beginning, "What the act does say." [1]

The view which I have taken of the construction of § 33 of the wills act appears to me to be in accordance with authority. The leading case on the subject is *Johnson* v. *Johnson* (1843) 3 Hare, 157, 13 L. J. Ch. N. S. 79, 8 Jur. 77. There the testator, Robert Johnson, devised and bequeathed to his son Michael Payne Johnson certain specific real estate and a share of his personal estate. Michael Payne Johnson died in his father's lifetime, leaving a widow and one child, the latter of whom survived the father. The son had made a will and codicil, by which he gave (in substance) all his property to his wife, and the ques-

[1] The passage referred to is as follows: "What the act does say is, that the devise is not to lapse, but is to take effect, and the mode in which it is to take effect is, 'as if the son had died after the father.' Now, how is this to be carried out? If the son has died intestate his heirs takes as he would if the son had in fact survived his father. If the son has made a will containing appropriate words, by residuary devise or otherwise, to carry the property, the devisees take. If the son has died insolvent, the creditors take; so far the matter is fairly clear, but what do they take in each case? and does the Crown also take anything? If the son had in fact survived the father, the beneficiaries of the son would have taken the property subject to the payment of duties to the Crown. The duties are a charge on the property. If those duties are not to be paid when the devisees get the property by virtue of the wills act, they will take more than if the son had survived the father. Is this making the devise take effect as if the son had survived the father? It seems to me that it is giving a different effect, and the only way to give it the same effect is to hold that, as the wills act gives the property to the devisees of the son as if he had survived his father; it gives it, subject to the same duties, and also gives to the Crown the same duties, as if the son had survived the father."

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tion was whether the property which was given to the son by his father's will passed by the son's will. Wigram, V.C., held that it did. He said (3 Hare, at p. 163): "Upon the construction of the 33d section of the statute 1 Vict. chap. 26, taken alone, a legatee within that section would take the same provision under his father's will, and *with the same powers and incidents of property,* as if he had actually survived the testator." He also said (3 Hare, at p. 164): "Without admitting that the words of the 3d section, taken alone, do not sufficiently describe a future accruing interest, like that under consideration, I think the legatee has, upon the true construction of the whole act, a [241] testamentary power over it. The 3d and 24th sections make the will speak from the death of the testator; and the 33d section in effect declares that, in the circumstances contemplated by that section, the child shall be taken to have died on a day later than his natural death." That case, therefore, establishes that a devisee or legatee within § 33 has a testamentary power over property devised or bequeathed to him by his father's will, though he may die in his father's lifetime. *Winter* v. *Winter* (1846) 5 Hare, 306, is another decision to the like effect. In *Pickersgill* v. *Rodger* (1876) 5 Ch. D. 163, Sir George Jessel, M.R., speaking of § 33 of the wills act, says (5 Ch. D. at p. 172): "The result, therefore, is this, that the child dying in the testatrix's lifetime has his estate augmented by the devise or bequest made to him by the testatrix; in other words, the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it."

In *Eager* v. *Furnivall* (1881) 17 Ch. D. 115, 50 L. J. Ch. N. S. 537, 44 L. T. N. S. 464, 29 Week. Rep. 649, Sir George Jessell, M.R., after citing and explaining *Johnson* v. *Johnson* (1843) 3 Hare, 157, 13 L. J. Ch. N. S. 79, 8 Jur. 77, says: "That, therefore, decides that the property is either disposable of by will or descends in the case of intestacy, as in this case. That being so, then there is no doubt that the person to take would be the heir of the devisee, and under the inheritance act he takes as purchaser." This passage was in argument interpreted as meaning that the heir of the devisee would take as purchaser. Such an interpretation is directly contrary to the

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decision of Stuart, V.C., in *Wisden* v. *Wisden* (1854) 2 Smale & G. 396, at p. 405, 18 Jur. 1090, 2 Week. Rep. 616, and inconsistent with what is laid down by Sir George Jessel himself in the immediately preceding context. I think that by "he" the learned judge meant the devisee himself, and not the heir of the devisee.

In *In re Hensler* (1881) 19 Ch. D. 612, 51 L. J. Ch. N. S. 303, 45 L. T. N. S. 672, 30 Week. Rep. 482, a father by his will made a devise to his son, who died in his father's lifetime, leaving issue living at the time of his death, and having by his will devised all his real [**242**] estate to his father. Hall, V.C., said: "By virtue of the 33d section of the wills act the property passed under the devise in the father's will, as if the devisee had died immediately after the death of his father. The effect of that is that I must consider the son to have survived his father, and to have taken as devisee. I must also consider that the property became subject to the son's will, and included in the general gift therein contained. The son must be deemed to have had the property;" and he made a declaration that the son took the property but died intestate as to it, and that the son's heir at law was entitled.

In *Executors of Perry* v. *Reg.* (1868) L. R. 4 Ex. 27, 19 L. T. N. S. 520, 17 Week. Rep. 382, Robert Perry bequeathed his personal estate to his son Robert Cobbold Perry, who died in his father's lifetime; and it was held that the executors of the son were liable for probate duty on the amount of the bequest. Kelly, C.B., says: "The legacy in this case, though in one sense it may be said to pass direct from Robert Perry to the legatee of Robert Cobbold Perry, still, in law, must be taken to pass through R. C. Perry, and forms part of the estate which his executors became possessed of under his will." This is a direct authority for the proposition that effect is to be given for the purposes of a taxing act to the provisions of § 33 of the wills act.

The same explanation of the effect of the enactment is found in numerous text writers. For example, Lord St. Leonards, in his treatise on the New Statutes relating to Property (2d ed. 1862, p. 393), when commenting on § 33, says: "Under this provision . . . the devisee or legatee, although he die in the lifetime of the testator himself, takes the property and may dis-

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pose of it by his will from his issue, who do not take by way of substitution." The late Mr. Hayes, in his Introduction to Conveyancing, 5th ed. 1840, p. 406, says: "The existence of issue of the devisee or legatee is, however, merely a collateral circumstance; for the property comprised in the devise or bequest is *not* given to such surviving issue, but is constituted part of the real or personal estate of the devisee or legatee, disposable by his or her will, and, if not so disposed of, transmissible [**243**] to his or her real or personal representatives, unless intercepted by assignees in insolvency or bankruptcy." See also 1 Jarman on Wills, 4th ed. pp. 353, 354; Joshua Williams on the Law of Personal Property, 5th ed. 1864, p. 324.

The main contention on behalf of the appellants was that the meaning of § 33 of the wills act is that, in the cases to which it applies, the will of the parent is to be read and construed as if it contained a clause providing that, in the event of a child's death, the property comprised in the gift to the child should go as if the child had died immediately after the testator; so that the property would not pass under the will of the child at all, but would pass directly under the will of the parent to the same persons as would have become entitled to it if the child had survived the parent. To this there are, in my opinion, three objections: (1) It is based on a departure from the language of the wills act; (2) it is not in accordance with the natural meaning of the actual language of the enactment; and (3) it is at variance with the interpretation of that language found in the cases and in textbooks of authority. This last consideration is one of great weight. It is, no doubt, of importance that every act of Parliament, be it the wills act or the finance act, should be correctly interpreted; but it is also most important that a construction, which has for a long series of years been placed on an enactment which involves the title to real estate, should be adhered to. It is impossible to say what mischief might be done if it were now for the first time to be laid down that real estate to which § 33 of the wills act applies does not pass under the will of a child, but does pass directly under that of the parent.

In the course of his able argument for the appellants Mr. Joseph Walton said more than once, and he appeared to attach importance to the observation, that the 33d section of the wills

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act was based on a fiction, whereas the finance act dealt with facts; and it may be worth while to consider how far the element of fiction enters into the subject. The finance act imposes a duty on property over which a person has such a general power as would, if he were *sui juris,* enable him to dispose of the property. Whether in a particular case a person [**244**] has or has not such a power is a question of law. In the case under consideration the law is to be ascertained from § 33 of the wills act, which prescribes that in certain cases the legal effect of a will shall be ascertained as if a person who predeceased the testator had in fact survived him. For the purpose of ascertaining the effect, a hypothesis, or, if you will, a fiction, is introduced; but beyond this there is nothing fictitious. The effect when ascertained by the statutory rule laid down by the legislature must, in a court of law, be regarded as being no less a reality than if it were ascertained by the rules of the common law.

Mr. Walton also urged that John Scott, Junior, was not at the time of his death competent in fact to dispose of this property, because his father was still alive, and could during his life deal with the property as he pleased, and might have revoked his will. It is undeniable that the father during his life was free to dispose of the property as he saw fit, either by revoking his will or otherwise. It is also undeniable that, if the father had in his lifetime seen fit to make another disposition of the property, any disposition made of it by the son would have been ineffectual. But why? Not from any want of competence on the part of the son to dispose of the property coming to him under the father's will, but because there would have been no property of the kind on which a disposition made by the son could operate, —*e.g.,* if the son had by will given to A. B. all the property coming to him under his father's will, such a gift would have been within his competence, but would have failed, if nothing ever came to the son under the father's will. For these reasons, I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for petitioners: *Crawley, Arnold, & Company.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

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Note.—Effect of statutes designed to prevent lapsing of testamentary provisions upon death of beneficiary in testator's lifetime to render the property bequeathed twice liable to legacy or inheritance tax.

As to inheritance or succession tax on property covered by power of appointment, see note to *Minot* v. *Stevens,* 33 L.R.A.(N.S.) 236; also *State ex rel. Smith* v. *Probate Ct.* 50 L.R.A.(N.S.) 262.

Re Scott, though turning upon the construction of English statutes, is nevertheless of interest to the American lawyer as dealing with a question likely to arise under similar statutes existing in this country. The inheritance tax laws of the various states have more or less resemblance to their English prototype; while statutes for the prevention of lapsing of legacies or devises in case of the death of the beneficiary before the testator, under conditions which vary in different states, are very generally in force. A search has, however, failed to disclose the existence of any other case involving the question.

As being of collateral interest in the present connection, reference may be made to the case of *Re Collateral Inheritance Tax* (1877) 2 Del. Co. Rep. 164, in which it was held that where one to whom a remainder had been devised died during the life tenancy, the estate which then passed to his heirs was not liable to any collateral inheritance tax, he not being seised or possessed of the land at the time of his death.

And it has been held that the fact that the donee, who survived the donor of certain shares of stock but a few days, did not live long enough to practically enjoy the gift, and that the certificate representing the shares had not actually come into her possession, did not prevent the property from being twice liable to transfer tax, as passing under the original gift and also under the will of the donee. *Re Borup* (1899) 28 Misc. 474, 59 N. Y. Supp. 1097.

Effect of statute to make provision preserved from lapse a part of the deceased beneficiary's estate.

Undoubtedly the decision of the English court in Re Scott was largely influenced by the fact that under the construction given to the English statute against lapsing, the property bequeathed is held to belong to the legatee as if he had survived the testator and to pass by his will. See *Johnson* v. *Johnson* (1843) 3 Hare, 157, 13 L. J. Ch. N. S. 79, 8 Jur. 77; In *Parker's Goods* (1860) 1 Swabey & T. 523, 31 L. J. C. P. N. S. 8, 6 Jur. N. S. 354; *Re Mason* (1865) 34 Beav. 494, 34 L. J. Ch. N. S. 603, 11 Jur. N. S. 835, 13 Week. Rep. 799. And if the devisee dies intestate her husband is held to be entitled to an estate by the curtesy. See *Eager* v. *Furnivall* (1881) 17

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Ch. D. 115, 50 L. J. Ch. N. S. 537, 44 L. T. N. S. 464, 29 Week. Rep. 649; *Re Derbyshire* [1906] 1 Ch. 135, *ante*, —, 75 L. J. Ch. N. S. 95, 54 Week. Rep. 135, 94 L. T. N. S. 138. The English statute (1 Vict. chap. 26, § 33) provides "that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

In America it is held, for most purposes, even under statutes resembling the English statute above quoted, that the testamentary gift forms no part of the estate of the legatee or devisee. Many of the American statutes, however, differ from the English act in the material particular that they expressly substitute the issue of the deceased legatee, instead of merely providing, as does the English statute, that the devise or bequest shall take effect as if the death of the beneficiary had happened immediately after that of the testator.

Thus, the statute in force at the time of the decisions hereinafter cited, in Kentucky and (with some minor verbal variations) in Michigan, Missouri, and Ohio, provides that "if a devisee or legatee dies before the testator or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will."

The North Carolina statute provides that under the conditions specified "such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportion, and estate as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

The statute in force at the time of the decisions hereinafter cited, in New York and (with minor verbal variations) Alabama, Georgia, and New Jersey, provides that under the requisite conditions "such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

It has been held that under these statutes the issue taken directly under the will, and not through the primary legatee or devisee (*Mann* v. *Hyde* (1888) 71 Mich. 278, 38 N. W. 78; *Thompson* v. *Myers* (1894) 95 Ky. 597, 26 S. W. 1014); and that the subject of the be-

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quest forms no part of the primary legatee's estate (*Mann* v. *Hyde, supra; Cook* v. *Munn* (1883) 12 Abb. N. C. 344, 65 How. Pr. 514). It may not be claimed by his personal representative (*Jones* v. *Jones* (1861) 37 Ala. 646; *Re Hafner* (1899) 45 App. Div. 549, 61 N. Y. Supp. 565), and is not subject to the claims of creditors of the primary legatee or devisee (*Cook* v. *Munn, supra; Suydam* v. *Voorhees* (1899) 58 N. J. Eq. 157, 43 Atl. 4; *Smith* v. *Smith* (1860) 58 N. C. (5 Jones, Eq.) 305).

These decisions go on the theory that the purpose of the statute is to benefit the issue rather that the estate of the deceased devisee or legatee. As said in *Re Hafner, supra,* "that statute was not intended for the benefit of creditors, but solely for the child or descendant of the deceased legatee, by making that child or descendant the immediate recipient of the testamentary gift directly from the testator. If there had been any other legislative intent, the gift would not have been by express words immediately vested in the substituted recipient who does not take by or through the original legatee, but immediately from the testator, free from any disposition which the original legatee might have made by will of her estate, that is to say, in the same way as if the original legatee had died intestate. It cannot be inferred that this statute was intended for the benefit of anyone other than the child or children of the deceased legatee or devisee, or that the gift should be subjected to the payment of the debts of the original legatee or devisee. As has been suggested, if that were the construction, and the original legatee or devisee left debts sufficient to consume the amount of the gift, those for whose benefit the statute was enacted would receive nothing, and the whole purpose of the statute be defeated. But for the statute the gift would have elapsed. It is preserved to and for the benefit of the child of the testator's granddaughter, and no one else; and so the surrogate should have adjudged."

The clause of the statute, "as if such legatee or devisee had survived the testator and had died intestate," is made to harmonize with the foregoing view of the purpose of the statute by construing it as referring to the shares and proportions in which the legacy or devise shall vest in the children or descendants. See *Cook* v. *Munn,* and *Suydam* v. *Voorhees, supra.*

So, also, in *Newbold* v. *Pritchett* (1836) 2 Whart. (Pa.) 46, it was held that under a statute providing that "no devise or legacy in favor of a child or other lineal descendant of any testator shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue with like effect as if such devisee or legatee had survived the testator," the children of a deceased devisee took under the testator's

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will, and not through the will of their father, the court saying. "If the doctrine of the defendants were admitted, so far from conferring a benefit on the issue it would enable the devisee or legatee to defeat them by his will or other disposition of the property. And it may also be remarked that if a benefit was contemplated to the devisee or legatee himself, there is no reason why it should not be conferred on him whether he had issue or not."

The Maryland statute, which more nearly resembles the English statute then those above set forth, provides "that no devise, legacy, or bequest shall lapse or fail of taking effect by reason of the death of any devisee or legatee named in any last will or testament, or any codicil thereto, in the lifetime of the testator; but every such devise, legacy, or bequest shall have the same effect and operation in law to transfer the right, estate, and interest in the property mentioned in such devise or bequest as if such devisee or legatee had survived the testator." But even under this statute it has been held that the subject of the testamentary provision forms no part of the estate of the deceased beneficiary (*Vogel* v. *Turnt* (1909) 110 Md. 199, 72 Atl. 661), does not pass by his will (*Glenn* v. *Belt* (1835) 7 Gill. & J. 362; *Halsey* v. *Protestant Episcopal Church* (1892) 75 Md. 275, 23 Atl. 781; *Vogel* v. *Turnt* (1909) 110 Md. 199, 72 Atl. 661 [*dictum*]), or pass as assets to his personal representative (*Glenn* v. *Belt, supra; Wallace* v. *Du Bois* (1885) 65 Md. 153, 4 Atl. 402). In *Glenn* v. *Belt, supra,* the court said: "The words of the law are not that the legacy shall pass in the same manner as if the legatee had survived and died, but that a transfer should in all cases be operated as if he had survived; that is, that the title to the legacy should be as binding and operative in the one case as the other. As it was not intended that the legatee not *in esse* at the time should take the right, because being impossible, it would be absurd, we likewise think, that his executor or administrator could not take as assets that which never could have been the testator's or intestate's. Had the legislature intended that the legacy should become, and be considered as assets belonging to the estate of the legatee, liable in the due course, of administration, we think it would not have been left to dubious construction, but would have been declared in unambiguous terms. The words, 'as if he had survived,' furnish no argument against this view, because they are barely used as words comparing the title derived under the law, by the persons who are to take, with the title the legatee would have had, and assimilating them in point of legal operation and validity."

There is, however, a difference of opinion as to whether the provision saved from lapsing by the statute may be considered a part of the estate of the deceased beneficiary so far as the rights of the surviving spouse are concerned. Thus in Georgia it has been held that the marital rights of the husband of the deceased beneficiary do

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not attach (see *Smith* v. *Williams* (1892) 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130); and in New York that the widow has no claim thereto (see *Cook* v. *Munn* (1883) 12 Abb. N. C. 344, 65 How. Pr. 514); but in Maryland it is held that the widow will take her distributive share (*Harris* v. *Harris* (1842) 12 Gill & J. 474), and that a surviving husband may take his statutory dower (*Vogel* v. *Turnt* (1909) 110 Md. 192, 72 Atl. 661).

There is also a difference of opinion upon the question whether a testamentary provision saved by the statute from lapse may be subjected to the indebtedness of the original beneficiary to the testator. In holding that it is not so subject, the court in *Carson* v. *Carson* (1858) 1 Met. (Ky.) 300 said: "The surviving issue take the estate devised, not as heirs at law or distributees of the deceased devisee, but as legatees, directly and immediately, under and by virtue of the will. They take 'as the devisee or legatee would have done if he had survived the testator,' the effect of which is to confer upon the surviving issue the same estate and interest under the will as if the devise or bequest had been directly to them, instead of their father. Such being the obvious effect and operation of the statutes, upon what principle can the debts against the ancestor of the appellants be regarded as a charge upon the legacy to which the latter are entitled as legatees? The legacy in contest certainly never vested in the ancestor in his lifetime, and at his death he had no interest in the estate of his father, which devolved upon his children, as his legal representatives. They claim now, not in his right, but in their own right. Upon the death of the testator the legacy vested immediately in them, and can no more be subjected to the debts of their father than any other estate which may have been acquired by them since his death from any other source. If D. B. Carson had survived the testator, he would have taken the estate bequeathed, and the whole of it, subject only to the charge for the advancement as contained in the will. As legatee, he would have been entitled to one tenth of the residuary fund, without any encumbrance or charge, except such as the will itself created. It is very true that in enforcing the payment of the legacy, the executor might have subjected a portion of it by way of set-off to the payment of the debts due by the legatee to the estate; but this right would have been founded upon equities wholly extrinsic, and having no connection with the will, or with any right derivable from it. So that it could not, with any propriety of speech, be said that the legatee, if he had survived, would have taken the estate bequeathed, subject to the payment of his debts to the testator."

So, also, in *Wattenbarger* v. *Payne* (1912) 162 Mo. App. 434, 145 S. W. 148, it is said: "It is not correct to say that the legislature only provided a means whereby the grandchild could claim his father's legacy. The legislature enacted a law that, in the con-

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tingency of the father's death, made his child an original legatee of the grandfather. It is everyhere agreed that an applicable statute enters into and becomes a part of the testator's will. Therefore, should it not be said that the grandfather willed the legacy to his son, if he be alive at the grandfather's decease, but if he be dead, then to the children of the son? In such case there certainly would be no charge of the son's debts to the testator, unless directed in the will. If the lawmakers had desired that the grandchild's legacy should be charged with the debts of his father to his grandfather, it seems to me to be accusing them with a great oversight in not explicitly saying so."

And see also, as holding that the legacy passes to those entitled to it free from all indebtedness which may have been due from the original legatee to the testator, *Wallace* v. *Du Bois* (1885) 65 Md. 161, 4 Atl. 402; *Hemsley* v. *Hollingsworth* (1913) 119 Md. 431, 87 Atl. 506.

On the other hand, in *Denise* v. *Denise* (1883) 37 N. J. Eq. 163, it was held that the statute was meant simply to put the issue of the deceased beneficiary in the place of their parents in the contingency specified, and to give them a right to take what their parent would have taken if he had survived the testator, but that it was not intended to raise grandchildren to a plane higher than that which their parents could ever have occupied, or to give rights as against the other beneficiaries of the will which the person in whose place they are substituted never would have been permitted to assert. The court criticizes the case of *Carson* v. *Carson, supra,* as making a very subtle and unwarranted distinction between the position of the primary legatee as a beneficiary under the will and his position as a debtor to the testator's estate, saying: "I cannot concur in this reasoning. It appears to me to be unsound in its main premises. The law of the land constitutes a part of every will, and the rights of every legatee must be defined, measured, and enforced by its rules. The law says a legatee indebted to his testator must pay his debt, or his legacy may be applied in discharge of his debt. That being the standard by which the rights of a legatee thus situated must be measured, I cannot regard it as true, either in fact or in logic, that he takes his legacy free from his debt; on the contrary, I think the fact is that his legacy is so absolutely subject to the payment of his debt that, if his debt happens to exceed his legacy, he cannot collect a penny of his legacy. Besides, the construction adopted in the case just referred to entirely overlooks, as it seems to me, the imperfection in our legal system which this statute was intended to remove. . . . Statutes must always be construed so as to give effect to the intent and object of the legislature, and this one, I think must be so read as to cure the mischief it was intended to remedy; that is, it should be held to put the substituted legatee in the place of his parent, and to give him just what his parent would have been entitled to, subject to

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the same equities that his parent would have been subject to, and bound by the same rules of justice that his parent would have been bound by. He must take in the same manner that his parent would have taken."

A similar conclusion was reached in *Baker* v. *Carpenter* (1903) 69 Ohio St. 15, 68 N. E. 577, the court saying: "The statute, as its title shows, was designed and intended to relieve against a hardship, by preventing the lapsing of devises and legacies; and its sole purpose and effect, as we think, was and is, upon the happening of the contingency therein mentioned, to place the grandchildren of a testator in their parent's stead, and to give to them the right to take what such parent would have taken if he had survived the testator. But certainly we think it was not the purpose, and could never have been the intention of the legislature, by the enactment of this statute to secure to the grandchildren of the testator greater rights and privileges than their parent—the primary legatee—could have had; nor may we reasonably assume that it was the intention of the legislature to give to such grandchildren rights against other beneficiaries under the will which the person in whose place they stand, and for whom they are substituted, never would himself have been permitted to assert."

But even where the provision is not regarded as subject to the deduction of the indebtedness of the original beneficiary to the testator, it has been held that it is subject to ademption by advances made to the original beneficiary. *Wallace* v. *Du Bois* (1885) 65 Md. 161, 4 Atl. 402. E. S. O.

[ENGLISH DIVISIONAL COURT.]

AUSTIN *v.* NEWHAM.

[1906] 2 K. B. 167.
Also Reported in 75 L. J. K. B. N. S. 563, 95 L. T. N. S. 490.

Landlord and tenant — Agreement of tenancy — Construction of.

A tenant entered into possession of premises under an agreement of tenancy "for a period of twelve months with the option of a lease after the aforesaid time at the rental of 30*l.* per annum:"—

Held, that under that agreement the tenant had a right to claim a lease for a further period of at least one year after the expiry of the first twelve months.

Semble, per Kennedy, J., he had a right to claim a lease for his life.

(May 7, 1906.)

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APPEAL from the Norwich Guildhall Court of Record.

On May 9, 1904, the plaintiff, Mrs. Austin, then Elizabeth Coe, entered into the following agreement with the defendant:—

"I Elizabeth Coe agree to let to Alfred John Newham the shop and dwelling house situated at No. 1A, Swansea Road, Norwich, for a period of twelve months with the option of a lease after the aforesaid time at the rental of 30*l.* per annum." The defendant upon the same date entered into possession of the premises under the agreement. Some time before the expiry of the twelve months therein named, the plaintiff formally demanded possession to be given up on May 9, 1905, but the defendant refused and claimed to exercise the "option" given by the agreement, whatever that option might be held to be, and he remained in possession after May 9, 1905. In October, 1905, the plaintiff brought ejectment. The judge held that, upon the option being exercised by the defendant, a further tenancy was created [168] for one year from May 9, 1905, and, that year being still unexpired, he gave judgment for the defendant. The plaintiff appealed.

R. V. Bankes, for the plaintiff. As no term was specified in the agreement for which the option might be exercised the clause giving the option must be treated as void. No action could possibly be maintained for specific performance of such an agreement. In *Fitzmaurice* v. *Bayley* (1860) 9 H. L. Cas. 78, Hill, J., in giving his opinion to the House of Lords, said: "It is clear that an agreement for a lease not specifying a definite term cannot be enforced." Here the judge relied upon the *Bishop of Bath's Case* (1606) 6 Coke, 34b, where it was held that "if a man leases his land for years, it is a good lease for two years, because it shall be taken good for such a number with which at least the plural number will be satisfied, and that is with two years." But there the word "years" did indicate a period of time. Here there is no corresponding word.

[**A. T. Lawrence,** J.: How do you explain the use of the words, "at the rental of 30*l.* per annum?"]

That has no reference to the period of the tenancy, but only to the rate of the payment. The words are equally applicable to a period of less than a year. They do not point to a tenancy for

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a year. The option is to take a "lease," which is something different from a tenancy for a year, which the defendant had already got.

W. H. Stevenson, for the defendant. The period for which the option was to be exercised was sufficiently defined by the agreement. The words, "per annum," point to the minimum period on which the parties had agreed; namely, one year after the expiry of the first twelve months. There is no sense in those words if they are interpreted as meaning something less than that, as was said in the *Bishop of Bath's Case* (1606) 6 Coke, 34b, with reference to the word "years." That case is on all fours with the present. The agreement here provides not that the rent is to be "at the rate of 30*l.* per annum," but that the lease is to be "at the rental of 30*l.* per annum," language which shows the intention to have [**169**] been that the rent was to be paid in one lump sum at the end of the year.

Secondly, even if the agreement was not sufficiently definite to entitle the defendant to have it specifically performed, still, as he was in possession and had agreed to pay rent, he was entitled to be treated as being in on the terms of a tenancy from year to year. It is well established that where a person who has been let into possession under an agreement for a future lease pays or agrees to pay any part of the annual rent thereby reserved he becomes a tenant from year to year. Woodfall's Landlord and Tenant, 17th ed. p. 244. In *Kusel* v. *Watson* (1879) 11 Ch. D. 129, 48 L. J. Ch. N. S. 413, 27 Week. Rep. 714, where the agreement provided that the plaintiff should have an underlease "at any period he may feel disposed," and he entered into possession of the premises under that agreement, it was held that he was entitled to an underlease for the residue of the lessee's term less one day, if he (the plaintiff) should so long live. That case is an authority that the defendant here is entitled to a lease for a further period of at least one year, and that is all that he asks for. The case of *Fitzmaurice* v. *Bayley* (1860) 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 3 L. T. N. S. 69, 8 Week. Rep. 750, is not in point. There the question was whether an agreement "to let the premises for the same rent and subject to the same conditions that I hold them myself," as it did not state the duration of the term, was a sufficient memorandum to satisfy the stat-

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ute of frauds. It was held that it was not. But here the question of the statute of frauds does not arise, as there has been part performance, the defendant having entered into possession under the agreement.

R. V. Bankes in reply.

Kennedy, J.: This case is not altogether free from difficulty, but I am not prepared to say that the judge was wrong in the construction that he put upon the agreement. The defendant by the terms of that agreement was to have "the option of a lease" after the expiry of the first twelve months at a certain rental. The judge held that that entitled him to a lease for a further period of one year, and no more. As the defendant does not ask for more it is unnecessary to decide whether that term was [170] sufficient. Having regard, however, to the case of *Kusel* v. *Watson* (1879) 11 Ch. D. 129, I am inclined to think that the option of "a lease" entitled him to claim a lease for life. Bramwell, L.J., there said: "The agreement provides that the tenant may come at any future time and apply for a lease. What kind of lease? The proper legal meaning of the term is a lease for the life of the tenant, and I think that the meaning the law puts on the words is a reasonable one." It is true that in that case there was a special provision that the plaintiff's lessor should not disturb him or raise his rent after he had laid out money in improving the premises, which pointed to an intention that the plaintiff's tenancy should be of considerable duration. But I do not think that Bramwell L.J.'s statement of the law was affected by that consideration. I am inclined to think that in the present case the defendant might have claimed a lease for as long a period as he is capable of holding it. In any case he is entitled to a year at least after the twelve months had expired. It would be altogether unreasonable to suppose that it was intended that he should be liable to be turned out at the end of the first twelve months.

The case of *Fitzmaurice* v. *Bayley* (1860) 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 3 L. T. N. S. 69, 8 Week. Rep. 750, relied upon by Mr. Bankes, is not in point. What was there decided was not that there was not a sufficiently definite agreement as to the duration of the term to have entitled the defendant to remain

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in possession if he had already entered, but that it was not sufficiently defined in writing to satisfy the statute of frauds, and to entitle the plaintiff to enforce it against the defendant, who had not entered into possession. I say nothing with respect to Mr. Stevenson's other contention upon the effect of the defendant's entry.

A. T. Lawrence, J.: I am of the same opinion. Here there was an agreement to let certain premises for twelve months certain "with the option of a lease after the aforesaid time at the rental of 30*l.* per annum." It may be that what the parties contemplated was that during the twelve months they would come to an agreement as to the period for which the lease was to be granted. But whether that is so or not, I think it is an unreasonable construction of the agreement to suppose that the [171] tenant meant to leave it in the power of his lessor to turn him out on the last day of the twelve months. They must have contemplated some further period after the twelve months had expired. The question is, What period? The words "per annum" suggest that what was contemplated was at least one further year. This construction is in accordance with the *Bishop of Bath's Case* (1606) 6 Coke, 34b, where it was held that a lease "for years" was a good lease for two years, that being the shortest period that would satisfy the plural number.

Judgment for the defendant.

Solicitor for the plaintiff: *Martelli, for Leathes Prior & Son, Norwich.*

Solicitor for the defendant: *W. E. Keefe, Norwich.*

Note.—Effect of covenant for lease, the term of which is not specified.

For annotation of collateral interest in the present connection, see note in 21 L.R.A.(N.S.) 575, on "character of estate created by grant, lease, or devise of property to person so long as he shall desire to live upon it, or devote it to a particular use;" note in 34 L.R.A. (N.S.) 1069, on "Character of tenancy created by a letting until the happening of a specified event;" and note in 32 L.R.A.(N.S.) 201,

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on "Validity and effect of stipulation in contract to renew on terms to be agreed upon."

A covenant in a lease to "renew" (or some equivalent expression) for a term not specified implies a renewal for the same term as that of the original lease. See *dictum* of Lord Abinger, in *Price* v. *Assheton* (1834) 1 Younge & C. Exch. 82, 4 L. J. Exch. in Eq. N. S. 3; *Lewis* v. *Stephenson* (1898) 67 L. J. Q. B. N. S. 296, 78 L. T. N. S. 165; *Rex* v. *St. Catherines Hydraulic Co.* (1910) 43 Can. S. C. 595; *Cunningham* v. *Pattee* (1868) 99 Mass. 248; *Leavitt* v. *Maykel* (1909) 203 Mass. 506, 133 Am. St. Rep. 323, 89 N. E. 1056; *Howard* v. *Tomicich* (1902) 81 Miss. 703, 33 So. 493; *Christian Feigenspan* v. *Popowska* (1909) 75 N. J. Eq. 342, 72 Atl. 1003; *Rutgers* v. *Hunter* (1822) 6 Johns. Ch. 215; *Western Transp. Co.* v. *Lansing* (1872) 49 N. Y. 499; *Walsh* v. *Ft. Schuyler Brewing Co.* (1913) 83 Misc. 488, 146 N. Y. Supp. 160; *King* v. *Wilson* (1909) 98 Va. 259, 35 S. E. 727; *Kollock* v. *Scribner* (1897) 98 Wis. 104, 73 N. W. 776, overruling *Laird* v. *Boyle* (1853) 2 Wis. 431, 7 Mor. Min. Rep. 301, 12 Mor. Min. Rep. 82.

So, a stipulation in a written lease for one year that the lessee "has the privilege of continuing this lease provided he fulfils the contract at the same rent" confers upon him the privilege of having the lease renewed for another year. *Lyons* v. *Osborn* (1891) 45 Kan. 650, 26 Pac. 31.

The word "this" in the clause, "this lease to be renewable at the pleasure of the lessee," implies not only the right of renewal, but also upon the terms and for the time specified in the instrument at the will and pleasure of the lessee for at least another term. *Creighton* v. *McKee* (1867) 2 Brewst. (Pa.) 383, 7 Phila. 324.

In *Alexander* v. *Herman* (1912) 21 Ont. Week. Rep. 461, 2 D. L. R. 241, a provision in a lease that "the lessee shall have the privilege of renewing the said lease from year to year at the expiration of any year so long as he may care so to do" was construed as a personal covenant, and not one running with the land, and therefore held to give a right to a renewal only while the lessee personally should exercise the option and while the lessor should live and continue to own the property.

In *Kusel* v. *Watson* (1879) 11 Ch. D. 129, 48 L. J. Ch. N. S. 413, 27 Week. Rep. 714, it was held that under an agreement for an underlease "at any period he [the sublessee] may feel disposed," the sublessor further agreeing not to molest, disturb, or raise the rent of the sublessee after his having laid out money in improving the premises, the sublessee was entitled to a lease for the residue of his lessor's term, less one day, if he should so long live.

In *Abeel* v. *Radcliff* (1816) 13 Johns. 297, 7 Am. Dec. 377, where a lease demising certain premises for the term of ten years at an annual rent contained a proviso that "at the expiration of the

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above term, the parties of the first part shall, if convenient, take and pay for the buildings on said lot at the appraisal of three indifferent men to be chosen by the said parties, or let the said lot for a yearly rent to be fixed by three indifferent men in like manner to be chosen by the said parties," it was held that, construing the words of the covenant, the lessor at most could not be bound to give any other than a new lease for the same term as that for which the original lease was given; but that as it was impossible to collect, from the naked agreement, for what term the parties contemplated the new lease should be given, the requirements of the statute of frauds were not satisfied.

That an agreement for a lease which does not indicate the term for which it is to run, either directly or by implication, is insufficient to meet the requirements of the statute of frauds, see *Fitzmaurice* v. *Bayley* (1860) 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 3 L. T. N. S. 69, 8 Week. Rep. 750; *Clinan* v. *Cooke* (1802) 1 Sch. & Lef. 22, 6 Eng. Rul. Cas. 721, 15 Eng. Rul. Cas. 344.

A lease for a year "with privilege of longer" is too indefinite to give the lessee a right to remain on the premises after the expiration of the year. *Howard* v. *Tomicich* (1902) 81 Miss. 703, 33 So. 493.

A stipulation in a lease of a store for a term certain, that the lessee shall "have the preference of renting said property so long thereafter as it shall be rented for a store" is too vague and uncertain to confer any definite rights upon the lessee which he can enforce either in law or equity. *Delashmutt* v. *Thomas* (1876) 45 Md. 140.

A clause in a lease, "with privilege of keeping and occupying said lot for such further time after the expiration of said term as said party of the second part [the lessee] shall choose or elect, yielding and paying therefor the same rent and all taxes as aforesaid," is too uncertain and indeterminate to confer a right of renewal; and at the same time precludes the implication from the provisions of the lease of anything as to these matters. *Western Transp. Co.* v. *Lansing* (1872) 49 N. Y. 499.

A clause in a lease which provides that the lessor agrees that if the lessee shall faithfully comply with the terms and conditions of the lease, that then at its expiration it may be renewed at the will and pleasure of the lessor for such period of time as the lessor shall then determine, confers no right to a renewal of the lease. *Thomas Hinds Lodge* v. *Presbyterian Church* (1912) 103 Miss. 130, 60 So. 66.

But a lessor is estopped by a lease for five years, and as much longer as the lessee desires, from bringing an action to recover possession so long as the lessee lives up to the agreement and desires to remain. *Sweetser* v. *McKenney* (1875) 65 Me.225.

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And in *Kelleher* v. *Fong* (1911) 108 Me. 181, 79 Atl. 466, a stipulation in a lease for a certain term, that the lessees "are to have the use and occupation of said store as long as they may want it," was held to give the lessee a right to renew indefinitely. E. S. O.

[SUPREME COURT OF CANADA.]

CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY *v.* LOUISA McNEVIN.

32 Can. S. C. 194.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal — Amount in controversy — Interest before action — 60 & 61 Vict. chap. 34, § 1 (c) — Accident insurance — Baggageman on railway — Conditions in policy — Hazardous occupation — Voluntary exposure to unnecessary danger.

A judgment for $1,000 damages with interest from a date before action brought is appealable under 60 & 61 Vict. chap. 34, § 1 (c).

An accident policy issued to M., who was insured as a baggageman on the C. P. Ry., contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company.) "This insurance does not cover . . . death resulting from . . . voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakeman, whose occupation was classed by the company as more hazardous than that of a baggageman.

Held (Davies, J., dissenting), affirming the judgment of the Court of Appeal (2 Ont. L. Rep. 521), which sustained the verdict for plaintiff at the trial (32 Ont. Rep. 284) that, as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions.

Held, also, that as the evidence showed that insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition.

(May 6, 1902.)

Present: Taschereau, Sedgewick, Girouard, Davies, and Mills, JJ.

5 B. R. C.

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[195] APPEAL from a decision of the Court of Appeal for Ontario (2 Ont. L. Rep. 521), affirming the judgments at the trial in favor of the plaintiff (32 Ont. Rep. 284).

The material facts are sufficiently stated in the above headnote and in the judgments given on this appeal.

Nesbitt, K.C., and **Fripp** for the appellant.

Aylesworth, K.C., and **McGarry** for the respondent.

Aylesworth, K.C., for the respondent, moved to quash the appeal for want of jurisdiction. The damages were $1,000, with interest from date of insured's death. Under 60 & 61 Vict. chap. 34, § 1 (c), the amount necessary to give the court jurisdiction is over $1,000, and interest cannot be added to make the damages sufficient.

The court held that the judgment showed jurisdiction on its face. It was claimed, also, that $159 paid into court reduced the amount in dispute below $1,000. As the court had decided on dismissing the appeal, they did not deal with this contention.

Nesbitt, K. C., and **Fripp**, for the appellant. Insured was killed while performing a brakesman's duty. If he had been insured as a brakeman the limit of his policy would have been $500 and the premium $29 per $1,000. It is inequitable that he should recover $3,000, for which he paid at a much lower rate. See *Aldrich* v. *Mercantile Mutual Accident Association* (1889) 149 Mass. 457, 21 N. E. 873.

Insured volunteered to do the coupling, and it was therefore a voluntary exposure to danger. *Tuttle* v. *Travellers Ins. Co.* (1883) 134 Mass. 175, 45 Am. Rep. 316; *Neill* v. *Travelers Ins. Co.* (1885) 12 Can. S. C. 55.

Aylesworth, K.C., and **McGarry**, for the respondent, referred to May on Insurance (3d ed.) p. 1228, par. 532; *Stone's Administrators* v. *United States Casualty Co.* (1871) 34 N. J. L. 371.

Taschereau, J.: An objection to our jurisdiction in this cause has been taken by Mr. Aylesworth on the [196] ground that the amount in controversy before us does not exceed the sum of $1,000. *City of Ottawa* v. *Hunter* (1900) 31 Can. S. C. 7. The judgment appealed from is for $1,000 with interest from a date anterior to the issue of the writ, so that on its face the

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appeal from it involves an amount sufficient to give us jurisdiction.

It is, however, contended for the respondent that as the appellant company offered by their pleas and deposited in court a sum of $159 in satisfaction of the plaintiff's claim, the pecuniary amount in contestation before us is reduced to a sum less than $1,000. This is so, it is conceded, as a matter of figures, if, as the respondent contends, that sum of $159 is to be considered as deducted from the amount of the judgment. The case of *Tintsman* v. *The National Bank* (1879) 100 U. S. 6, 25 L. ed. 530 (see also *Hilton* v. *Dickinson* (1882) 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424, in the United States Supreme Court) seems in point, and would perhaps support the respondent's contention, though it might be possible to distinguish it. The question is not free from difficulty. However, as we have come to the conclusion that the appeal should be dismissed upon the merits, it need not be solved here.

Now, as to the merits. The appeal is from the judgment of the Court of Appeal for Ontario, 2 Ont. L. Rep. 521, affirming, by an equal division of opinion among the learned judges, the judgment of the trial judge in favor of the respondent, reported at 32 Ont. Rep. 284.

The respondent brought this action as beneficiary named in a policy of accident insurance issued by the appellant to her son, Alexander McNevin, deceased, to recover the sum of $1,000, amount of the said policy, with interest thereon from the 27th day of August, 1900.

[197] The defense to the action was based entirely upon the two following conditions of the policy within which it was sought by the appellant to bring the facts connected with the death of the insured as disclosed by the evidence; and, it is conceded on their part that if they fail to bring the case under one of these clauses, their appeal fails.

Condition number 1 indorsed on the policy is as follows:

"1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in the application, his insurance shall be only for such sums as the premiums paid by him will purchase at the rates fixed for such increased hazard."

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The second clause of condition, number 3, is as follows:—

"This insurance does not cover disappearance or suicide, sane or insane, nor injuries of which there is no visible mark on the body (the body itself, in case of death, not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability resulting, wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or effected; disease or bodily infirmity, hernia, fits, vertigo, sleep-walking, medical or surgical treatment (except amputation necessitated solely by injuries and made within ninety days after accident), intoxication or narcotics, voluntary or involuntary taking of poison or contact with poisonous substances (except in cases where it occurs to insured whilst necessarily exposed in the discharge of the duties pertaining to the occupation under which he is insured), duelling or fighting, war or riot, intentional injuries (inflicted by insured or any other person), voluntary overexertion, violating law or violating the rule of any corporation, voluntary exposure *to unnecessary danger,* expeditions into wild or uncivilized countries."

The appellant pleaded, first, that the accident in question happened to the deceased while he was engaged in an occupation or exposure more hazardous than that stated in his application for insurance, namely, that of brakesman; or failing this, secondly, that the accident resulted in consequence of voluntary exposure to unnecessary danger.

[198] The accident being proved, upon the appellant, I think, rested the burthen of proving the facts which they rely upon to be relieved from the liability which, prima facie, the policy imposes upon them. *Badenfeld* v. *Massachusetts Mutual Accident Association* (1891) 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; *Williams* v. *United States Mutual Accident Association* (1894) 82 Hun, 268, 31 N. Y. Supp. 343.

The Ontario insurance act, R. S. O. (1897) chap. 203, § 153, expressly decrees that where the event has happened on the occurrence of which the insurance is payable, but the amount payable is a matter of dispute, the amount payable by the insurer shall prima facie be the maximum amount indicated in the policy, and it shall lie on the insurer to prove the contrary. This enactment would seem to have its application here, though there

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is room for doubt on this point. However, the course followed at the trial renders the question of the *onus probandi* immaterial here.

Another rule that must not be lost sight of in the consideration of this appeal is that, in case of a real doubt arising in the construction of a policy, the construction most favorable to the insured must prevail. I am free to say, however, that, as I read this policy, there is, in my opinion, no room for doubt in the construction of it in relation to the facts of the case.

As to condition No. 1, thereof:—

"If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in the application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard."

All the judges in the Court of Appeal have been of the opinion, with the trial judge, that the defense to the action *quod hoc* could not prevail. And the appellant has not been able to show any error in the rejection of the said ground of defense. The deceased did not give up his occupation or employment as baggageman [199] to become a brakesman. And he was not injured in any exposure classed by the company as more hazardous. Occupations are classified, according to the evidence, but not exposures. The word "exposure" in the policy is a redundancy. It means nothing else than any occupation more hazardous. I could not say more upon this first ground of the appellant's pleas without repeating what has been said in the opinions of the courts appealed from. To the cases already cited, I would add a reference to *The National Accident Society* v. *Taylor* (1891) 42 Ill. App. 97; and to *The Provident Life Insurance Co.* v. *Fennell* (1868) 49 Ill. 180, in which the insured, represented in the policy as a switchman, met his death while acting as a brakeman.

Did McNevin's death result from voluntary exposure to unnecessary danger? is the next point to be considered.

The trial judge answered that question negatively, and, in my opinion, he could not but do so. It never came to this man's mind, on the occasion in question, accustomed to couple cars as the evidence shows he was, that there was any danger in the act

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he was going to perform. "Voluntary," in this policy, conveys the idea of an act of volition. It means "knowingly," "wilful," not that he is going knowingly to perform an act which for others might be dangerous, but "knowingly," "rashly," and conscious of danger to himself, recklessly, taking the risk, wanton or grossly imprudent exposure. *Manufacturers Accident Indemnity Co.* v. *Dorgan* (1893) 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945. It is the exposure that must be wilful, voluntary. *Burkhard* v. *The Travellers Insurance Company* (1883) 102 Pa. 262, 48 Am. Rep. 205; *The Providence Life Insurance Company* v. *Martin* (1870) 32 Md. 310. Now, how could the deceased [200] be said to have wilfully exposed himself to danger, to a danger that was for him certain, and ought to have been present to his mind (*Lovell* v. *The Accident Insurance Company* (1874) 3 Ins. L. J. 877); if he did not know that the act was for him dangerous, or if he believed that it was not? *Miller* v. *The American Mutual Accident Insurance Company* (1893) 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39; *Jones* v. *United States Mutual Accident Association* (1894) 92 Iowa, 652, 61 N. W. 485; *Keene* v. *New England Mutual Accident Association* (1894) 161 Mass. 149, 36 N. E. 891; *Schneider* v. *The Provident Life Insurance Company* (1869) 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174.

He never thought for a moment that he was in the least exposing himself to danger when he went to couple these cars. He did not knowingly risk his life, when he did so, no more than it could be said that the thousands of men who couple cars daily could be said to risk their lives or to act rashly. The accident was not what might have been reasonably expected to follow the act done. The act of coupling cars requires experience and carefulness. The experience the deceased had, but he must have been careless and negligent. That is what caused the accident. Carelessness and negligence, however, are no defense to an accident of this nature. Even if he could be said to have been imprudent in attempting to couple these cars, though with the experience he had it was not so, that would not constitute a voluntary and wanton exposure to danger within the meaning of the policy. The case of *Neill* v. *The Travelers Insurance Company* (1885) 12 Can. S. C. 55, and *Cornish* v. *The Accident Insurance Company*

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(1889) 23 Q. B. D. 453, 58 L. J. Q. B. N. S. 591, 38 Week. Rep. 139, 54 J. P. 262, have been relied upon by the appellant, but the facts in those cases are not such as to make them authority in the case at the bar. I would dismiss the appeal, with costs.

[201] **Sedgewick, J.:** I am of opinion that the judgment of the court below is right.

The principal question is as to the interpretation to be given to the words in the policy, "voluntary exposure to unnecessary danger." If the act of the deceased which occasioned his death comes within this description, the appeal must succeed, otherwise not, as we all agree. The phrase was doubtless borrowed from accident policies issued by United States companies, and there are, in that country, many decisions as to its intent and meaning, most of them being cited in the first volume of the American and English Encyclopædia of Law, p. 284, under the title of "Accident Insurance." They are not binding on this court, but I have gone carefully over them all, and they confirm me in the view I take as to the proper meaning of the phrase in controversy.

The deceased was an employee of the Canadian Pacific Railway Company at Arnprior station. The only officers of the company there were the station agent and himself. He was insured as baggageman, but he was called the porter. His duties were not defined by any written document or instructions by the company; he was, I suppose, to do all that it was necessary to do in and about the station and yards that the agent was not to do. He was, in fact, a "man of all work," subject to the agent's directions, and to his own sense of duty in the interests of his employers. On a certain Sunday there was a freight train at the station in charge of a conductor and two brakesmen, the conductor and one brakesman being at the front of the train, the other brakesman at the rear. It was necessary that the train should back down to a yard a considerable distance off, to attach it to a van. To do this a coupling pin had to be found, none being on board the train. The deceased [202] found the pin and did the coupling. In doing this, he slipped between the van and the train to which it was attached, was run over and killed. The brakesman denied asking him to do the coupling, but a witness testified that he heard a conversation between him

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and the deceased, and he understood from the conversation that that was the request made.

The trial judge found that the deceased understood that the request was made, and did the coupling in pursuance of it. He had several times done the same thing before. It was part of his duty to seal cars, involving the same danger as coupling cars, but the agent gave evidence that it was no part of his duty to couple cars, simply meaning, as I think, that as a general thing he had nothing to do with the management or operation of a train, whether at a standstill or in motion, that duty being imposed upon the engineman, conductors, and brakesmen, and that, as porter, his work was "on shore."

Was there, then, on this occasion, and under these circumstances, "a voluntary exposure to unnecessary danger?" Let me critically examine this phrase. To bring the company within the exception, they must be able to answer affirmatively, four independent questions of fact:

1. Was there danger?
2. Was there unnecessary danger?
3. Was there an exposure to danger? and
4. Was there a voluntary exposure to danger?

I am inclined to the belief that the original design of the stipulation was to prevent an act on the part of the assured exhibiting a conscious, reckless, wanton, and wicked disregard of personal safety, whether of life or of limb,—the doing of a thing that would, according to the view of a "reasonable man," be madness, except upon the hypothesis of voluntary suicide or self-mutilation.

[203] But, let me deal with the questions just suggested. Was the doing of the deed in question a danger,—a dangerous deed? The evidence discloses that the act complained of was, in ordinary circumstances, done by a person on board a train, known as a brakesman, and that his occupation was more hazardous and more liable to accident than that of the deceased, just as probably the occupation of a seaman is more subject to risk than that of a landsman. But, in the exercise of a brakesman's duty, he has many things to do other than the coupling of cars,—what these duties are, I have not knowledge to specify. He lives and moves and has his being on a moving machine. Accidents may befall

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him from innumerable causes. He may fall from the car's roof on which he has to travel. There may be a defective track, or a miscreant may obstruct or derail it, or a collision with another train or engine before or behind may occur and misfortune may come to him, but there is no evidence that, as far as he is concerned, the coupling of a car alone is any more dangerous than many acts the deceased was accustomed to do. It may be easy enough to decide whether or not one occupation is more dangerous than another, but it is not easy to determine whether or not the coupling of two cars by one who knows how to do it (as the deceased did) is more dangerous than the act of leaping from the platform of a moving car, or say the harnessing of a horse to a carriage. Danger lurks everywhere. The word ("danger"), however, is not used in that broad sense in the policy. The act in question must be an act which, as regards the person doing it, a jury would find was dangerous. I have great doubt as to whether the coupling of cars here was dangerous within the meaning of the policy, and I therefore do not answer the first question, yes or no.

[204] In dealing with the second question, I assume there was danger, but was the doing of the act a necessary or an unnecessary danger? If necessary, the appellants are out of court. The act of coupling must be done. It is an inseparable incident to the operation of a railway, and, in fact, the doing of it, if a danger at all, is a necessary danger.

My admission as to the first question applies to the third, and I come to the fourth question, Was there a voluntary exposure? These are the only words in the phrase I am commenting on, that have reference to conscious personal agency or the exercise of human volition or free will. I think that the adjective "voluntary" here is not used as the opposite of "involuntary," but to describe an act which the deceased thought he had the liberty to do or not to do as he might think best. To convey the intended idea the word "unnecessary" might have been here used as a proper equivalent or synonym. As before suggested the two words "voluntary exposure" mean exposure not called for,—officious exposure. They do not include an exposure or act done under a sense of duty, under a feeling of obligation, to either a fellow servant or to the company, whose man he is, to an act behind

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which there is an insistent voice, a human or Divine imperative impelling it. The evidence, I think, shows that it was in obedience to this call of duty that the deceased acted as he did, and the question now being considered must, therefore, be answered in the negative.

Upon these grounds, which I might elaborate, at much greater length, I am of opinion that the appeal should be dismissed, with costs.

Girouard, J., concurred in the judgment dismissing the appeal, with costs.

[205] **Davies, J.** (dissenting): With respect to the contention of the insurance company that, as the death of the assured resulted from injuries received in "an occupation or exposure classed by the company as more hazardous than that of baggageman at station," which insured was described as being in his application, he was not entitled to recover at all, or, if entitled at all, could only recover under clause 13 of the policy such sum as the premium paid would purchase at the rate fixed for such increased hazard, I understand we are all of the opinion, in common with the judges of the Court of Appeal and the trial judge, that such contention cannot be upheld, because the "occupation or exposure" classed by the company as more hazardous than that stated in the application of insured does not cover the case of a mere transient or isolated act of the insured done by him outside of his regular occupation. This clause in the policy was only intended to cover an entire change of occupation or employment, and, if the company intended that it could cover isolated or transient acts done or committed by the insured, and not part of his duties as baggageman at the station or fairly arising therefrom, language much more clear and definite must be used to express the intention.

With regard, however, to the company's contention that the plaintiff cannot recover because of the stipulation in the second paragraph of clause 3, I am of opinion that it is sound and fatal to the right of the plaintiff to recover.

The clause is one common to many accident policies, and reads as follows:

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This insurance does not cover . . . voluntary exposure to unnecessary danger.

I agree with the learned Justices Osler and Moss, in the Court of Appeal, that the injuries the deceased received when engaged in coupling cars of the train were within the clause. [206] Many decisions have been given in different states of the Union, as to the meaning of the provision in question, but none of them appear to be directly in point. They will be found collected in the first volume of the American and English Encyclopædia of Law, at page 306.

The learned editors say that the words, "voluntary exposure," imply conscious intentional exposure to something which one is willing to take the risk of, and "one which reasonable and ordinary prudence would pronounce dangerous." I agree in these definitions as far as they go, but they do not cover all the ground. If the danger is unknown and hidden an injury would be accidental.

There is a clear distinction between a voluntary act and a voluntary exposure to danger. A hidden danger may exist, yet exposure thereto, but without knowledge of the danger, would not constitute a voluntary exposure to it. The act may be voluntary and the exposure involuntary. It must also be an unnecessary danger. A voluntary exposure to a necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger.

The policy recognizes the existence of dangers which it may become necessary for the insured to meet in the daily walks of life, and even out of the ordinary walks. For instance, the attempt to rescue persons in deadly peril, where such an attempt is not absolutely foolhardy. I think the words imply a conscious intentional exposure to a danger which neither his contractual duty to his employers nor the duties of our common manhood call upon him to face. For instance, voluntarily assisting in the rescue of a ship's crew in a stormy sea, or in an attempt to save the lives of passengers on a burning car, would not be a voluntary exposure to unnecessary danger, because it would be a man's duty as such so to assist.

[207] Mr. May, in his Treatise on Insurance, § 2624, formulates the rule thus:

"If the insured voluntarily places himself in a position where,

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from the surrounding circumstances a person of ordinary prudence would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such an act."

Read in the light of the limitations I have already suggested, I think this fairly states the law, and that the words, "unnecessary danger," mean when the whole policy and its object is studied, danger which it is unnecessary for the insured to incur.

The cases of *Neill* v. *The Travelers Insurance Co.* (1885) 12 Can. S. C. 55, and *Cornish* v. *The Accident Insurance Co.* (1889) 23 Q. B. D. 453, 58 L. J. Q. B. N. S. 591, 38 Week. Rep. 139, 54 J. P. 262, are both pertinent and instructive as to the proper construction of the clause.

In the case at bar, it does seem to me that the insured, by entering as he did between the cars and coupling them together, brought himself directly within the clause. As the learned judge has found this act was clearly not part of his duty as baggageman at station, nor was it part of his duty in any way to couple cars or to have anything whatever to do with the management of trains. The learned judge, however, decided that the deceased understood Carroll, the brakesman, to ask him to make the coupling, and that, therefore, his exposure would not be voluntary. With every respect to the learned judge, I do not think the evidence warranted any such finding. Carroll himself expressly swore that he did not ask him, and the "understanding" of a bystander ought not to countervail the positive testimony of the man Carroll himself. But, whether Carroll did or did not ask him makes no difference to my mind. The deceased man was in no way connected with or under the control of or working with Carroll. The latter, as he says, had [**208**] stepped off the train "to get a pin, and, as he could not see any pin around, gave the signal to stop the cars;" and that he neither asked nor expected McNevin to make the coupling. The latter, at the time, was not on duty, had no business with the management of the train service, and the brakesman had no authority or control over him in any way whatever. The fact is the deceased, being off duty, was riding on the train for amusement or pleasure, and either voluntarily or officiously, without any request, or voluntarily at the request of Carroll, but, without any duty or obligation on his part, attempted to couple the cars, by going between them, with a pin.

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It does seem to me to be idle to talk of such an act not being a dangerous one. To one not expert in the business it would be a most dangerous one, and to any, even the coolest and most self-reliant men, accompanied with great danger.

The conclusion I have reached, reluctantly, is that the act of coupling cars together when in motion, as this train was, towards the car to be coupled, was so far as deceased was concerned a voluntary, if not an officious, exposure of himself to a danger known to him and unnecessary for him to face. There was neither moral obligation nor contractual duty impelling him to incur the risk he did, and it was outside of his ordinary duties. It was not one of the dangers which a man may meet in or about his ordinary avocation or while engaged in any pursuit, recreation, act, or duty incident to his ordinary habits of life or the promptings of humanity, but was a "voluntary exposure to unnecessary danger."

Mills, J.: I concur in the judgment of Mr. Justice Taschereau, and think this appeal should be dismissed, with costs.

[209] I do not think that the performance of a single hazardous act will take the policy out of the class in which the respondent's son was insured, and put him in a class in which the rate of insurance is very much higher, and where the amount to which he would be entitled is very much less. McNevin was used to coupling cars, and so possessed skill which, in his case, made the danger very much less, and a single act done, as would very naturally be done by an active, industrious, and obliging man, would not put him in the class of one whose ordinary employment would be regarded as specially dangerous. In all cases of this sort some regard must be had to surrounding circumstances. The performance of an isolated act of this kind cannot be regarded as determining his employment, and as taking him out from the class in which he is insured and putting him in one that is more hazardous. The doing of an act such as that he was engaged in when he lost his life is a very different thing indeed from being constantly engaged every day in work of this kind. There is no one whose life is insured, who does not at times do some act more hazardous than those which partain to his ordinary occupation, and yet no insurance company would think it their duty to take one out of the class in which he was insured because occa-

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sionally in his lifetime he felt it his duty to perform some act which entailed greater risk than those connected with his ordinary occupation. Some regard must be had to the relations in which men situated as McNevin was, stand to others about him. The good will and occasional assistance of others make it necessary that he should sometimes perform acts which oblige them. No one can suppose that he desired to endanger his life by what he did. He simply aimed at doing for others what he would that they should, in like circumstances, do for him, and [210] this, it would seem, was the thought uppermost in his mind. He was not deserting his ordinary avocation to engage in more hazardous labors. He was not seeking to become insured in one class while his ordinary avocation put him in another where his rate of insurance would be very much greater. He simply did that which almost every industrious man finds it occasionally necessary to do, in order to oblige others, and the mutual service which men do for each other in this way is as much in the interest of insurance companies as it is in the interest of the parties who perform it.

The policies of insurance companies, in this regard, must receive a reasonable construction; and it is neither to the advantage of the insurer nor the insured that the lines should be drawn with so much rigidity that to occasionally cross them is to be regarded as a violation of the conditions of the policy which they have received.

I cannot, therefore, hold that McNevin's act was a voluntary exposure to unnecessary danger. It was, in my opinion, a duty that it was his interest to perform, and his act is not within the rule of voluntary exposure to unnecessary danger, but is quite as certainly outside of the intended restriction as the more extreme acts performed by the promptings of humanity in the cases suggested. In all these cases we must have regard to the surrounding circumstances of the party, and we must not lay down rules which would operate against the individual who, in endeavoring to get on, and who, as a useful employee, is occasionally called upon to step outside of those limits within which he, for the most part, remains.

Appeal dismissed, with costs.

Solicitors for the appellant: *Tripp & McGee.*

Solicitors for the respondent: *McGarry & Devine.*

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Note.—The above reported case appears to be the only decision on the question whether the act of coupling cars by one employed by a railroad in some capacity other than that of a brakeman is a "voluntary exposure to unnecessary danger" within the meaning of an accident insurance policy.

The general rule, as gathered from the decisions on the question as to what constitutes a voluntary exposure to unnecessary danger, is that not only must the exposure have been voluntary, that is, actually willed by the assured,—and the danger unnecessary, that is, a risk which in the ordinary course of events the assured was not called upon to take,—but the assured must also have known that the act which he did was in fact dangerous and, with such knowledge, have assumed the risk thereof. See annotation in 40 L.R.A. 432, 22 L.R.A.(N.S.) 779, 27 L.R.A.(N.S.) 1164, 40 L.R.A.(N.S.) 135.

Upon the closely related question as to what constitutes an exposure to obvious risk of injury or obvious danger within the meaning of an accident policy, see note in 50 L.R.A.(N.S.) 1218.

The following decisions may also be of interest in connection with the case reported:

Exposure to the danger incident to one's occupation is not such an unnecessary exposure to danger as will defeat a recovery. *Wilson* v. *Northwestern Mut. Acci. Asso.* (1893) 53 Minn. 470, 55 N. W. 626.

So, an insurer of a yard switchman or yard brakeman whose duty requires the handling of broken cars, cannot escape liability for death or injury suffered by the insured while in the discharge of his regular duty, on the ground that the accident was caused by voluntary exposure to unnecessary danger. *National Ben. Asso.* v. *Jackson* (1885) 114 Ill. 533, 2 N. E. 414.

An insurer may not prove that the insured represented in his application for insurance that his occupation was that of a switchman on a railway, and that he was killed while performing the duty of a brakeman, such representation not amounting to a covenant that the insured would do no act not connected with such occupation, or that he would not engage in any different occupation, where the policy was not against accidents occurring in the course of his occupation, but against accidents generally, and provided expressly in what particular cases the company was not to be liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation. *Provident L. Ins. Co.* v. *Fennell* (1868) 49 Ill. 180.

A policy insuring a railroad switchman as such against accidental injuries or death does not cover injuries resulting from negligence or want of due care in the performance of customary duties. *Standard Life & Acci. Ins. Co.* v. *Jones* (1891) 94 Ala. 434, 10 So. 530.

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[ENGLISH DIVISIONAL COURT.]

WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED *v.* THE KING.

[1905] 2 K. B. 391.
Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

Petition of right — International law — Annexation — Liabilities of conquered state — Creditor's rights against conqueror — Act of state — Jurisdiction of municipal courts.

A petition of right alleged that, before the outbreak of war between the late South African Republic and Great Britain, gold, the produce of a mine in the Republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the government of the Republic; that the government by the laws of the Republic was liable to return the gold or its value to the suppliants; and that by reason of the conquest and annexation of the territories of the Republic by her late Majesty the obligation of the government of the Republic towards the suppliants in respect of the gold was now binding upon his majesty the King.

Held, on demurrer, that the petition disclosed no right on the part of the suppliants which could be enforced against his Majesty in any municipal court.

There is no principle of international law by which, after annexation of conquered territory, the conquering state becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered state incurred before the outbreak of war.

(June 1, 1905.)

PETITION of right by the West Rand Central Gold Mining Company, Limited.

1. The suppliants are a company registered in England under the companies acts, and owning and working a gold mine in his Majesty's Transvaal Colony.

2. On October 2, 1899, 283.90 ounces of gold of the value of 1,104*l.*, the property of the suppliants, while in transit by train from Johannesburg to Cape Town, were taken possession of at Vereeniging by an official of the late South African Republic, namely, one Hugo, the resident magistrate of the district; the said Hugo was acting upon the instructions of the state attorney

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of the said Republic, who ordered him to take the said gold into safe keeping.

3. The said Hugo gave for the said gold (together with other gold taken at the same time) a receipt of which the following is a translation:—

Vereeniging Station.

Seized this day by order of the Attorney General S. A. R. (117) one hundred and seventeen cases containing gold and [392] valuables sealed as usual and conveyed by the mail train from Johannesburg.

(Signed) J. S. N. Hugo,
Res. J. P.

2 October, 1899.

4. Further, two bars of gold weighing 767.20 ounces of the value of 2,700*l.*, the property of the suppliants, and being then in the custody of the African Banking Corporation of Johannesburg, were on October 9, 1899, taken possession of upon the premises of the said bank by two officials of the government of the said Republic; namely, one Wagner and one Krause.

5. The said two officials gave for the said gold (together with other gold taken at the same time) a sealed receipt of which the following is a translation:—

Received 8 bars of raw gold weighing 2,617.23 ounces, value 8,996*l.*, namely:—

1. M. K. C.	49	730.75	ozs.	African Banking Corporation £4,411.
2. M.	124	395.85	"	
3. O. T. S.		125.10	"	
4.		39.35	"	
5.		19.00	"	
6.	215	539.03	"	o/a Worcester Exp^{n} & G. M. Co. £1885.
7.		149.55	"	o/a West Rand Central G. M. Co. £2,700.
8.		617.65	"	
		2,617.23		

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From

African Banking Corporation, Limited,
Johannesburg.
(Sd) M. Wagner Mijn Inspecteur.
(Sd) F. E. T. Krause.

Government Commission of Peace and Order upon instructions of State Secretary.

[Seal.] Upon behalf of the Government Commission, Witwatersrand, 10 October, 1899, S. A. R. Division of Peace and Order.

(Sd) Martin Mulder,
(Sd) Joseph Van Gelder, Secretaries.

[393] 6. The said gold was in each case taken possession of by and on behalf of and for the purposes of the then existing government of the said Republic, and the said government by the laws of the said Republic was under a liability to return the said gold or its value to your suppliants. None of the said gold has been returned to the suppliants, nor did the government make any payment in respect thereof.

7. A state of war between her late Majesty Queen Victoria and the said Republic commenced at 5 P. M. on October 11, 1899.

8. Her late Majesty's forces conquered the said Republic, and by a Proclamation in the name of her late Majesty dated September 1, 1900, the whole of the territories of the said Republic were annexed to and became part of her dominions, and the late government of the said Republic thereby ceased to exist.

9. By reason of the said conquest and annexation her late Majesty succeeded to the sovereignty of the said government, with all its rights and duties, and became entitled to the whole property of the said government, and the obligation which vested in the said government in respect of the said gold is now as binding upon his Majesty as though the acts and things which gave rise to such obligation had been done or suffered by her late Majesty.

The suppliants therefore humbly pray the return of the said gold, or payment to them of the said sum of 3,804*l.*

Demurrer: "His Majesty's Attorney General on behalf of our Lord the King gives the court here to understand and be

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informed that the petition of right is bad in substance and in law, in that it does not disclose a sufficient or lawful or any obligation on his Majesty towards the suppliants, or any legal or equitable right of the suppliants against his Majesty cognizable by the courts of this country or enforceable therein and on other grounds sufficient in law to sustain this demurrer."

Joinder: "The petition herein is good in substance and in law." [1]

Sir R. Finlay, A.G., and **Sir E. Carson**, S.G. (**H. Sutton** with them), for the Crown. The facts alleged in the petition [**394**] of right disclose no obligation on the part of his Majesty towards the suppliants, nor any right enforceable in this court. Where the sovereign annexes a foreign country the terms on which he does so are settled by him, and no court of law has any power to interpret or enforce those terms. *Cook* v. *Sprigg* [1899] A. C. 572, 68 L. J. P. C. N. S. 144, 81 L. T. N. S. 281, 15 Times L. R. 515, is the latest of a long series of authorities which show that annexation is an act of state, and that the municipal courts have no authority to enforce obligations assumed by the conquering state under the treaty of annexation.

[They referred to *Nabob of the Carnatic* v. *East India Co.* (1791) 1 Ves. Jr. 371; 2 Ves. Jr. 56; *Elphinstone* v. *Bedreechund* (1830) 1 Knapp, P. C. C. 316, 2 St. Tr. N. S. 379; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859) 13 Moore, P. C. C. 22, 7 Moore, Ind. App. 476, 7 Week. Rep. 722; *Ex Rajah of Coorg* v. *East India Co.* (1860) 29 Beav. 300, 30 L. J. Ch. N. S. 226, 7 Jur. N. S. 350, 3 L. T. N. S. 646, 9 Week. Rep. 247; *Sirdar Bhagwan Singh* v. *Secretary of State for India* (1874) L. R. 2 Ind. App. 38; *Doss* v. *Secretary of State for India* (1875) L. R. 19 Eq. 509, 32 L. T. N. S. 294, 23 Week. Rep. 773; *Rustomjee* v. *Reg.* (1876) 1 Q. B. D. 487, 45 L. J. Q. B. N. S. 249, 34 L. T. N. S. 278, 24 Week. Rep. 428, 2 Q. B. D. 69, 46 L. J. Q. B. N. S. 238, 36 L. T. N. S. 190, 25 Week. Rep. 333; *Respublica* v. *Sparhawk* (1788) 1 Dall. 357, 1 L. ed. 174; *United States* v. *Pacific Railroad* (1886) 120 U. S. 227, 30 L. ed. 634, 7 Sup. Ct. Rep. 490.]

To take an extreme case, if a conquering state confiscated all

[1] There was a trial at bar for the hearing of the demurrer.

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private property in the conquered state, the owners of the property could not obtain redress by means of litigation in the municipal courts of the conquering state. So, in the present case, his Majesty's government having declined to recognize the suppliants' claim, this court has no power to adjudicate upon it. The claim is in fact absolutely without foundation. Assuming that the Transvaal government were under some contractual obligation to indemnify the suppliants, that obligation does not as a result of the annexation fall upon his Majesty. There is no principle of international law by which a conquering state becomes *ipso facto* liable to discharge all the contractual obligations of the conquered state.

Lord R. Cecil, K.C., and **J. A. Hamilton**, K.C. (**Theobald Mathew** and **A. M. Talbot** with them), for the suppliants. For the purpose of this demurrer the facts must be taken to be as [**395**] stated in the petition, and the case may therefore be argued on the basis that the gold was taken by the Transvaal government under its constitutional powers, that the seizure was not made for the purpose of hostilities, and that at the moment of annexation the Transvaal government was under an enforceable obligation to return the gold or its value. The case for the suppliants may be put in the form of three propositions, the first of which is that by international law, where one civilized state after conquest annexes another civilized state, the conquering state, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered state, except liabilities incurred for the purpose of or in the course of the particular war. The writings of jurists on international law and stipulations in treaties are evidence of what is international law, and the proposition in question is supported by the following authorities: Hall's International Law, 5th ed. p. 99; Wheaton's International Law, 4th ed. p. 46; Halleck's International Law (Baker's 1878 ed.), vol. ii, p. 504; Calvo's Droit International, 4th ed. vol. i. p. 248; vol. iv. p. 404; Heffter's Droit International de l'Europe, 4th ed. pp. 63, 64; Huber's Die Staatensuccession, s. 217. Secondly, international law is part of the law of England. This question has been much considered in cases relating to the rights and privileges of ambassadors (See *Barbuit's Case* (1737) Cas. t. Talb. 281; *Triquet* v.

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Bath (1764) 3 Burr. 1478, 1 W. Bl. 471; *Heathfield* v. *Chilton* (1767) 4 Burr. 2016; *Viveash* v. *Becker* (1814) 3 Maule & S. 284, 15 Revised Rep. 488); cases dealing with the seizure of debts (See *Dolder* v. *Huntingfield* (1805) 11 Ves. Jr. 283, 8 Revised Rep. 159; *Wolff* v. *Oxholm* (1817) 6 Maule & S. 92, 18 Revised Rep. 313); and cases turning on the law as to territorial waters (see *Reg.* v. *Keyn* (1876) 2 Ex. D. 63, 46 L. J. Mag. Cas. N. S. 17, 13 Cox, C. C. 403, 5 Eng. Rul. Cas. 946). All these cases have been dealt with by the English courts on the footing that the principles of international law relating to them form part of the common law of England. Thirdly, the English courts have recognized and adopted the particular principle of international law enunciated above as the [**396**] first proposition. *Calvin's Case* (1609) 7 Coke, 1, 2 Eng. Rul. Cas. 575; *Blankard* v. *Galdy* (1693) 2 Salk. 411; *Campbell* v. *Hall* (1774) 1 Cowp. 204, Lofft, 655. The sovereign has, it is admitted, power when annexing a conquered state to impose what terms and conditions he pleases as to the taking over of the obligations of the conquered state; but if nothing is said about a particular obligation then it must be deemed to have been taken over, and it can be enforced in the municipal courts of the conquering state. As soon as the annexation is complete the sovereign's absolute power to impose terms and conditions is at an end, and the rights of the inhabitants of the conquered state must be recognized and dealt with in the same way as those of the other subjects of the sovereign. *Advocate-General of Bombay* v. *Amerchund* (1829) 1 Knapp, P. C. C. 329, note; *Mayor of Lyons* v. *East India Co.* (1836) 1 Moore, P. C. C. 175, 43 Revised Rep. 27; *King of the Two Sicilies* v. *Willcox* (1851) 1 Sim. N. S. 301, 20 L. J. Ch. N. S. 417, 15 Jur. 214; *United States of America* v. *Prioleau* (1865) 2 Hem. & M. 559, 35 L. J. Ch. N. S. 7, 11 Jur. N. S. 792, 13 L. T. N. S. 92, 13 Week. Rep. 1062; *United States* v. *McRae* (1869) L. R. 8 Eq. 69, 38 L. J. Ch. N. S. 406, 20 L. T. N. S. 476, 17 Week. Rep. 764; *Republic of Peru* v. *Peruvian Guano Co.* (1887) 36 Ch. D. 489, 56 L. J. Ch. N. S. 1081, 57 L. T. N. S. 337, 36 Week. Rep. 217; *Republic of Peru* v. *Dreyfus* (1888) 38 Ch. D. 348, 57 L. J. Ch. N. S. 536, 58 L. T. N. S. 433, 36 Week. Rep. 492; *Frith* v. *Reg.* (1872) L. R. 7 Ex. 365, 41 L. J. Exch. N. S. 171, 26 L. T. N. S 774, 21 Week. Rep. 19. The

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American authorities support the contention of the suppliants. In *United States* v. *Percheman* (1833) 7 Pet. 51, at p. 86, 8 L. ed. 604, 617, Marshall, Ch. J., said: "It is very unusual even in cases of conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled."

[They also referred to *Mitchel* v. *United States* (1835) 9 Pet. 711, 9 L. ed. 283; *Smith* v. *United States* (1836) 10 Pet. 326, 9 L. ed. 442; *Strother* v. *Lucas* (1838) 12 Pet. 410, 9 L. ed. 1137.]

With regard to *Cook* v. *Sprigg* [1899] A. C. 572, 68 L. J. P. C. N. S. 144, 81 L. T. N. S. 281, 15 Times L. R. 515, the facts there were so very different from those of the present case that it cannot [**397**] be regarded as an authority. Moreover, in so far as *Cook* v. *Sprigg, supra,* laid down the general propositions that conquest destroys all private rights, and that the repudiation of liability by a government is an act of state which the courts cannot inquire into, it is contrary to the authorities and to the principles of international law. See Pollock on Torts, 7th ed. pp. 108, 109; Law Quarterly Review, vol. xvi. pp. 1, 2.

The other cases relied on by the Crown are also not in point. They are cases where attempts were being made to enforce rights which had been the subject of treaties or agreements between two sovereign powers, or to recover property which had been seized by the armed forces of the Crown. The present case does not fall within either category. The suppliants are not seeking to set aside or interfere with the annexation, but they contend that one of the effects of the annexation has been to transfer from the Transvaal government to the Crown the liability to indemnify the suppliants for the loss of their gold, and that the liability is one which can be enforced in this court.

[In addition to the cases mentioned above, they also referred to *Walker* v. *Baird* [1892] A. C. 491, 61 L. J. C. P. N. S. 92, 67 L. T. N. S. 513, and *Raleigh* v. *Goschen* [1898] 1 Ch. 73, 67

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L. J. Ch. N. S. 59, 77 L. T. N. S. 429, 14 Times L. R. 36, 46 Week. Rep. 90.]

Sir R. B. Finlay, A.G., in reply. Text writers on international law are not authoritative. The passages from their writings which have been quoted do not really support the first proposition put forward on behalf of the suppliants; they are mere general expressions of opinion, and not subject to the qualification, which the suppliants concede, that the proposition must be limited to liabilities incurred before war, and not for the purpose of war. This concession is fatal to the authority of the passages relied on. The proposition is further qualified by the admission that a conquering state may, by the terms of the annexation, stipulate that certain liabilities will not be taken over, but it is said that all liabilities not expressly excepted are taken over. It cannot be seriously contended that the absence from Lord Roberts' proclamation of a schedule of excluded debts saddles the British government with liability [**398**] for all the debts of the Transvaal government, and no authority has been or can be produced to support this contention. Moreover, there are passages in Huber's Staatensuccession, at pp. 65, 66, 114, 115, which show that his views on this point would have been very much qualified if his mind had really been addressed to the question as it arises in this case. The proposition of the suppliants further involves an unlimited liability on the part of the conquering state,—a liability "without benefit of inventory." The passages cited from Hall, Halleck, and Heffter do not support this view, but on the contrary rather go to show that, in the opinion of these writers, the liability of the conquering state does not extend beyond the amount of the assets taken over; but the text-books are not in agreement on this point. See Westlake's International Law, part I. p. 76. The cases cited for the Crown establish beyond all doubt that international law is not part of the common law of England, and that the claims of the suppliants cannot be enforced by petition of right. Decisions as to ambassadors and territorial waters are beside the question; they are *ex necessitate* cases, for neither ambassadors' privileges nor territorial waters could be said to exist if they were not recognized and enforced in courts of law.

Cur. adv. vult.

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The judgment of the court (Lord Alverstone, Ch. J., Wills and Kennedy, JJ.) was read by—

Lord Alverstone, Ch. J.: In this case the Attorney General, on behalf of the Crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. The petition of right alleged that two parcels of gold, amounting in all to the value of 3,804*l.*, had been seized by officials of the South African Republic—1,104*l.* on October 2 in course of transit from Johannesburg to Cape Town, and 2,700*l.* on October 9, taken from the bank premises of the petitioners. No further statement was made in the petition of the circumstances under which, or the right by which, the government of the Transvaal [**399**] Republic claimed to seize the gold; but it was stated in paragraph 6, "That the gold was in each case taken possession of by, and on behalf of, and for the purposes of, the then existing government of the said Republic, and that the said government, by the laws of the said Republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold has been returned to your suppliants, nor did the said government make any payment in respect thereof." The petition then alleged that a state of war commenced at 5 P. M. on October 11, 1899, that the forces of the late Queen conquered the Republic, and that by a Proclamation of September 1, 1900, the whole of the territories of the Republic were annexed to, and became part of, her Majesty's dominions, and that the government of the Republic ceased to exist. The petition then averred that by reason of the conquest and annexation her majesty succeeded to the sovereignty of the Transvaal Republic, and became entitled to its property; and that the obligation which vested in the government was binding upon his present Majesty the King.

Before dealing with the questions of law which were argued before us, we think it right to say that we must not be taken as acceding to the view that the allegations in the petition disclosed a sufficient ground for relief. The petition appears to us demurrable for the reason that it shows no obligation of a contractual nature on the part of the Transvaal government. For all that appears in the petition the seizure might have been an

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act of lawless violence. The allegations that A seized property belonging to B, and that thereupon by law an obligation arose on the part of A to return to B his property, or pay its value, might be truly made in respect of any wrongful seizure of A's property. We do not assent to the proposition of Lord Robert Cecil that it is sufficient to allege what may be a ground of action if something else be added which is not stated. Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action, and unless the obligation alleged in the present instance arose out of contract it is clear that no petition of right could be maintained. A passage in the judgment of Willes, J., in the [400] case of *Gautret* v. *Egerton* (1867) L. R. 2 C. P. 371, 36 L. J. C. P. N. S. 191, 16 L. T. N. S. 17, 15 Week. Rep. 638, states this view so clearly that we think it well to quote it. Willes, J., says: "The argument urged on behalf of the plaintiffs, when analyzed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover *secundum allegata et probata.* What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged." I need scarcely add that in dealing with a petition of right, which must be based upon contract, that observation would of course have its full force and effect. The discussion, however, is academical, as the Attorney General for the Crown, as well as Lord Robert Cecil for the suppliants, desired that we should deal with the case as if any necessary amendment had been made, and decide the question whether all the contractual obligations of a state annexed by Great Britain upon conquest are imposed as a matter of course, and in default of express reservations, upon Great Britain, and can be enforced by British municipal law against the Crown in the only way known to British municipal law, that is, by a petition of right. We have no hesitation in answering this question in the negative, but, inasmuch as it is one of great importance, and we have had

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the advantage of hearing very able argument upon both sides, we think it right to give our reasons in some detail.

Lord Robert Cecil argued that all contractual obligations incurred by a conquered state, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be made upon grounds which, without depriving the original liability of its character of a legal obligation against the vanquished state, make it inexpedient for [401] the conquering state to adopt that liability as against itself; in other words, upon ethical grounds, into which enter considerations of propriety, magnanimity, wisdom, public duty, in short, of policy, in the broadest and widest sense of the word. It is equally clear that these are matters with which municipal courts have nothing to do. They exist for the purpose of determining and enforcing legal obligations, not for the purpose of dividing them into classes, and saying that some of them, although legally binding, ought not to be enforced. The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by states before conquest such as no conqueror would ever think of carrying out. Some illustrations will occur in the course of our subsequent remarks. For the moment we will pursue Lord Robert's argument into further detail. His main proposition was divided into three heads: First, that, by international law, the sovereign of a conquering state is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered state, must be protected and can be enforced by the municipal courts of the conquering state.

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authority, it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase

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"international law"), rests upon a consensus of civilized states, not expressed in any code or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a concensus could [402] be shown to exist. Perhaps it is in regard to the extraterritorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least open to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se,* than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although

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the sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debt should *in foro* [403] *conscientiæ* be assumed. There must also be many contractual liabilities of the conquered state of the very existence of which the superior power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment,—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent state, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the government of the conquered state. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general state expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was

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absolute to take over all debts and contractual obligations incurred before war had been actually declared.

Turning now to the text writers, we may observe that the proposition we have put forward, that the conqueror may impose what terms he thinks fit in respect of the obligations [404] of the conquered territory, and that he alone must be the judge in such a matter, is clearly recognized by Grotius. See "War and Peace," book iii. chap. 8, § 4, and the Notes to Barbeyrac's edition of 1724, vol. ii. p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers, that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered state. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged that in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform, taken by such treaties. See, as to this, § 27 of the 4th edition of Hall's International Law, and the opinion of Lord Clarendon there cited. Lord Robert Cecil cited a passage from Mr. Hall's book, 4th ed. p. 105, in which he states that the annexing power is liable for the whole of the debts of the state annexed. It cannot, however, be intended as an exhaustive or unqualified statement of the practice of nations, whatever may have been the opinion of the writer as to what should be done in such cases. It is not, in our opinion, directed to the particular subject now under discussion. The earlier parts of the same chapter contain passages inconsistent with any such view. We would call attention particularly to § 27 on pp. 98 and 99 of the 4th edition, where the question as to the extent to which obligations do not pass is discussed, and the passage on pp. 101 and 102, referring to the discussion between England and the United States

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in 1854, in which Lord Clarendon's contention that Mexico did not inherit the obligations or rights of Spain [405] is approved of by Mr. Hall. In the same way the passage from Halleck, § 25 of chapter 34 (Sir Sherston Baker's edition of 1878), cited by Lord Robert Cecil, cannot be construed as meaning to lay down any such general proposition. It is cited from a chapter in which other sections contain passages inconsistent with the view that the legal obligation to fulfil all contracts passed to the conquering state. The particular section is in fact directed to the obligations of the conquering or annexing state upon the rights of private property of the individual—the point which formed the subject of discussion in the American cases upon which the suppliants relied and with which we shall deal later on. The passage from Wheaton (Atlay's ed. p. 46, s. 30) shows that the writer was only expressing an opinion respecting the duty of a succeeding state with regard to public debts, and, as the note to the passage shows, it is really based upon the fact that many treaties have dealt with such obligations in different ways. We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law. We have not had the opportunity of referring to the edition of Calvo, cited by Lord Robert Cecil, but the sections of the 8th book of the edition published in 1872 contain a discussion as to the circumstances under which certain obligations should be undertaken by the conquering state. The distinction between the obligations of the successor with regard to the private property of individuals on the one hand, and the debts of the conquered state on the other, is clearly pointed out, and paragraphs 1005 and 1010 are quite inconsistent with any recognition by the author of the proposition contended for by the suppliants. The same observations apply to Heffter, another work upon which reliance was placed. As regards Max Huber's work on State Succession, published in 1898, there is no doubt, as appears from Mr. Westlake's recent book on international law, published last year, and from other criticisms, that Huber does attempt to press the duty of a succeeding or conquering state to recognize the obligations of its predecessor to a greater extent than previous writers on international law, but the extracts cited by the Attorney [406]

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General in his reply and other passages in Huber's book show that even his opinion falls far short of the proposition for which the suppliants contend. But whatever may be the view taken of the opinions of these writers, they are, in our judgment, inconsistent with the law as recognized for many years in the English courts; and it is sufficient for us to cite the language of Lord Mansfield in *Campbell* v. *Hall* (1774) 1 Cowp. 204, at p. 209, in a passage the authority of which has, so far as we know, never been called in question: "It is left by the Constitution to the King's authority to grant or refuse a capitulation. . . . If he receives the inhabitants under his protection, and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace; he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion." And so, much earlier, in the year 1722 (2d Peere Williams, p. 75), it is said by the Master of the Rolls to have been determined by the Lords of the Privy Council that "where the King of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases." References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the state accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable cession raise such different questions from those which apply to conquest, that it would answer no useful purpose to discuss them in detail.

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to [407] which we have assented along with other nations in general may properly be called international law, and as such

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will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case* (1737) Cas. t. Talb. 281; *Triquet* v. *Bath* (1767) 4 Burr. 2016, and *Heathfield* v. *Chilton* (1764) 3 Burr. 1478, 1 W. Bl. 471, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when [408] dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text writers

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upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts. The cases of *Wolff* v. *Oxholm* (1817) 6 Maule & S. 92, 18 Revised Rep. 313, and *Reg.* v. *Keyn* (1876) 2 Ex. D. 63, 46 L. J. Mag. Cas. N. S. 17, 13 Cox, C. C. 403, 5 Eng. Rul. Cas. 946, are only illustrations of the same rule,—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend,—namely, that the claims of the suppliants based upon the alleged principle that the conquering state is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering state can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering state would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal courts could those courts decide as to the obligations which ought or ought not to be discharged by the conquering state. To refer again to the instance given in the commencement of this judgment—the obligation incurred by the conquered state by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view for the conquering state to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from the year 1793 down [409] to the present time, holding that matters which fall properly to be determined by the Crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts. It is

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quite unnecessary to refer in detail to them all. They extend from *Nabob of the Carnatic* v. *East India Co.* (1791) 1 Ves. Jr. 371, 2 Ves. Jr. 56, down to *Cook* v. *Sprigg* [1899] A. C. 572, 68 L. J. C. P. N. S. 144, 81 L. T. N. S. 281, 15 Times L. R. 515. As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any doubt upon that part of the judgment which is in the following words: "The taking possession by her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of state and treating Sigcau as an independent sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation." We do not repeat the citations of *Secretary of State for India* v. *Kamachee* (1859) 13 Moore, P. C. C. 22, 7 Moore, Ind. App. 476, 7 Week. Rep. 722, and *Doss* v. *Secretary of State for India* (1875) L. R. 19 Eq. 509, 32 L. T. N. S. 294, 23 Week. Rep. 773, referred to in the judgment in *Cook* v. *Sprigg, supra.* They form part of the chain of authorities to which we have referred, and we observe in passing that we are not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook* v. *Sprigg.* The case of *Rustomjee* v. [410] *Reg.* (1876) 1 Q. B. D. 487, 45 L. J. Q. B. N. S. 249, 34 L. T. N. S. 278, 24 Week. Rep. 428; 2 Q. B. D. 69, 46 L. J. Q. B. N. S. 238, 36 L. T. N. S. 190, 25 Week. Rep. 333, affirmed in the Court of Appeal, deserves, however,

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one word of comment. There the British government had received from the Chinese government a sum of money in respect of certain claims made upon that government by persons, of whom the petitioner was one. A petition of right was brought in order to enforce payment by our government of those claims out of the sum so received by the British government. From some points of view that case may be considered much stronger in favor of the suppliant than the present, the money having been received by the Crown under a treaty specifically on account of the debts due to British subjects. In delivering the judgment of the Court of Appeal, Lord Coleridge used language which has a strong bearing on the present case. He said (2 Q. B. D. at p. 73): "The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts." It was contended by Lord Robert Cecil that the view we are taking was inconsistent with certain American decisions and with certain decisions of our own Court of Chancery, to which we think it right to refer. A careful examination of these cases satisfies us that rightly understood no such inconsistency exists. The American cases were a series of decisions of the Supreme Court of the United States respecting the rights of the owners to landed property in territories formerly forming part of independent countries which had been ceded to or annexed by the United States. The particular cases cited were *United States* v. *Percheman* (1833) 7 Pet. 51, 8 L. ed. 604; *Mitchel* v. *United States* (1835) 9 Pet. 711, 9 L. ed. 283; *Smith* v. *United States* (1836) 10 Pet. 326, 9 L. ed. 442, and *Strother* v. *Lucas* (1838) 12 Pet. 410, 9 L. ed. 1137. These cases arose respecting the rights of landed property in Florida, Louisiana, and Missouri. They [411] were all cases of cession, and in all of them the treaties of cession and subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession, and the sole question was whether, under

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the circumstances of each individual case, private rights of property existed and could be enforced as against the United States. No question of duty of the country, to whom the territory passed, of fulfilling the obligations of the original country in any other respect arose; and the language of Marshall, Ch. J., (7 Pet. at p. 86, and of Baldwin, J., 9 Pet. at p. 733; 10 Pet. at p. 329), all of which is to the same effect, must be construed solely with reference to the rights of private property in individuals, such property being locally situated in a country annexed by another country. We asked Lord Robert Cecil and Mr. Hamilton whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered state and private individuals. They informed us that they had not been able to do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering states with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered state towards individuals is to be undertaken by the conquering state. The English cases on which reliance was placed were *United States* v. *Prioleau* (1865) 2 Hem. & M. 559, 35 L. J. Ch. N. S. 7, 11 Jur. N. S. 792, 13 L. T. N. S. 92, 13 Week. Rep. 1062, in which a claim was made by the United States government to cotton which had been the property of the Confederated States; *United* [**412**] *States* v. *McRae* (1869) L. R. 8 Eq. 69, 38 L. J. Ch. N. S. 406, 20 L. T. N. S. 476, 17 Week. Rep. 764, which recognized the right of the government suppressing rebellion to all moneys, goods, and treasures which were public property at the time of the outbreak. *Republic of Peru* v. *Peruvian Guano Co.* (1887) 36 Ch. D. 489,

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56 L. J. Ch. N. S. 1081, 57 L. T. N. S. 337, 36 Week. Rep. 217, and *Republic of Peru* v. *Dreyfus* (1888) 38 Ch. D. 348, 57 L. J. Ch. N. S. 536, 58 L. T. N. S. 433, 36 Week. Rep. 492. The only principle, however, which can be deduced from these cases is that a government claiming rights of property and rights under a contract cannot enforce those rights in our courts without fulfilling the terms of the contract as a whole. They have, in our judgment, no bearing upon the propositions which we have been discussing. We are aware that we have not commented upon all the cases which were cited before us,—we have not failed to consider them; and any arguments which could be founded upon them seem to us to be covered by the observations already made. We are of opinion, for the reasons given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against his Majesty in this or in any municipal court; and we therefore allow the demurrer, with costs.

Judgment for the Crown.

Solicitors for suppliants: *Waltons, Johnson, Bubb, & Whatton.*

Solicitor for the Crown: *Solicitor to the Treasury.*

Note.—Duty of conquering state with respect to obligations of conquered state.

Summarized, the opinion of the court in the above case (apart from the preliminary observation upon the sufficiency of the pleading) amounts to this: (I.) That international law, in the sense that it is the sum of the usages which "have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations," forms part of the law of England; (II.) that "matters which fall properly to be determined by the Crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts" (p. 409); and that the obligation of which an adjudication was sought by petition of right in the present case, assuming it to be one recognized by international law, falls within this category; but (III.) that there is no sufficient evidence to show that it is an established rule of international law that a

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conquering state, in the absence of an express limitation of the obligations to be taken over, becomes bound to fulfil the obligation of the conquered.

Although this note, in view of Lord Alverstone's extended discussion of the third proposition, is principally concerned therewith, something may be said with reference to the first and second as well.

I.

Not the least element of interest in WEST RAND CENT. GOLD MIN. CO. v. REX is the concurrence of the court in the proposition that the established principles and usages of international law form part of the law of England. For an interesting discussion of this case and the earlier English decisions on the question, see article by Professor Westlake, entitled "Is International Law a Part of the Law of England," in 22 Law Quarterly Review, 14.

In the United States, international law has been considered as part of the law of the land, not only in admiralty and prize cases (see *Talbot* v. *Seeman* (1801) 1 Cranch, 1, 2 L. ed. 15, s. c. on former appeal 4 Dall. 34, 1 L. ed. 730; *Murray* v. *The Charming Betsy* (1804) 2 Cranch, 64, 2 L. ed. 208; *30 Hogsheads of Sugar* v. *Boyle* (1815) 9 Cranch, 191, 3 L. ed. 701; *The Nereide* (1815) 9 Cranch, 388, 3 L. ed. 769; *The Antelope* (1825) 10 Wheat. 66, 6 L. ed. 268; *The Scotia* (1871) 14 Wall. 170, 20 L. ed. 822; *The Habana* (1899) 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290; *United States* v. *The Active* (1814) 4 N. C. (2 Car. Law. Repos. 192), Fed. Cas. No. 14,420), but also in cases of a purely municipal character (see *Respublica* v. *De Longchamps* (1784) 1 Dall. 111, 1 L. ed. 59; *Kennett* v. *Chambers* (1852) 14 How. 38, 14 L. ed. 316; *Underhill* v. *Hernandez* (1895) 38 L.R.A. 405, 13 C. C. A. 51, 26 U. S. App. 573, 65 Fed. 577, affirmed in 168 U. S. 250, 42 L. ed. 456, 18 Sup. Ct. Rep. 83; *Hatch* v. *Baez* (1876) 7 Hun, 596).

Accordingly, it has been held that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. *Murray* v. *The Charming Betsy* (1804) 2 Cranch, 64, 2 L. ed. 208; *Ex parte Blumer* (1865) 27 Tex. 734.

So, also, in *Hilton* v. *Guyot* (1894) 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, it is declared by Mr. Justice Gray that "international law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination."

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In view of the opinion expressed in WEST RAND CENT. GOLD MIN. Co. v. REX, as to the weight to be given to opinions of writers on international law, it may be of interest to note in the present connection the views expressed by the United States Supreme Court as to the sources to which the courts may resort for information.

In *30 Hogsheads of Sugar* v. *Boyle* (1815) 9 Cranch, 191, 3 L. ed. 701, Chief Justice Marshall said, in speaking of the law of nations: "This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."

In *Hilton* v. *Guyot, supra,* Mr. Justice Gray said that, in ascertaining what the law of nations is, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.

And in *The Habana* (1899) 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290, Mr. Justice Gray in delivering the opinion of the court said: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. . . . Wheaton places among the principal sources of international law 'text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.' As to these he forcibly observes: 'Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in

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their works being impugned by the avowal of contrary principles.' Wheaton, International Law, 8th ed. § 15. Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law.' 1 Kent, Com. 18."

II.

Professor Westlake has pointed out (22 Law Quarterly Rev. p. 23) that the constitutional difficulty which precludes English courts from drawing out, as against the Crown, the consequences of an act of state, and enforcing rights supposed to be acquired thereunder, does not exist in the United States. "The constitutional position of the Supreme Court and the very purpose for which it exists, on the one hand, prevent it from questioning any act of state performed by the Executive within its lawful powers, and, on the other hand, require it to draw out the consequences of any such act of state and apply them to the cases before it. When, therefore, a conquest made by the United States, or a cession made to them, is presented to the consideration of that court, it is free to apply any rule of international law which it finds relating to the situation, and it applies such rule not only between private parties, but also between a private party and the Republic so far as the Republic has not decided the matter by the constitutional action of its executive."

III.

Inasmuch as instances in which the territory of a civilized state has been annexed by another without the accompaniment of a treaty making provision for its public obligations are extremely rare in practice, there cannot be said to be established rule of international law fixing the duty of the conqueror in respect thereto.

The government of the United States has contended for the principle that the conquering state is under a duty to respect the obligations of the state which is absorbed. Mr. Adams, Secretary of State, wrote to Mr. Everett, charge d'affaires to the Netherlands, August 10, 1818, as follows: "No principle of international law can be more clearly established than this: That the rights and the obligations of a nation in regard to other states are independent of its internal revolutions of government. It extends even to the case of conquest. The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others,

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the fulfilment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it cannot, with any color of reason, be contested on the ground of right." Quoted in 1 Moore, International Law Dig. p. 334.

This statement of Mr. Adams is quoted in an opinion by Attorney General Griggs, September 20, 1899, 22 Ops. Atty. Gen. 583, in reply to a letter of the Secretary of State relating to certain claims against Hawaii arising prior to annexation, which were afterward presented to the Department of State as claims against the United States. Continuing, the Attorney General said: "No fair exception to this rule can be perceived unless expressly provided for by treaty stipulations or the instrument of cession, when the absorbed territory becomes an integral part of the acquiring state and is altogether merged in it." It was his opinion, however, that this principle does not apply in the case of a federation, as to which he said: "If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government, rather than the central authority, should respond out of its separate assets to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future."

Where Chili, at the close of the war with Peru, took possession of the guano deposits belonging to Peru, the United States expressed the opinion to Chili that as the foreign obligations of Peru incurred in good faith before the war rested upon and were secured by the products of her guano deposits, Chili was under a moral obligation not to appropriate that security without recognizing the lien existing thereon. 1 Moore, International Law Dig. p. 335.

There are instances in which the conquering state has taken over a part of the general debt of the state from which it has seized territory. In 1866, the debt of Denmark was divided between that country and Schleswig-Holstein, then annexed by Germany, and Italy, by convention with France, took upon itself so much of the papal debt as was proportionate to the revenues of the papal provinces which it had appropriated.

The United States, however, refused to assume in behalf of Cuba any portion of the so-called Cuban debt, for the payment of which the Cuban revenues were pledged, on the ground that it consisted of a "mass of Spanish obligations and charges," and was "in no sense created by Cuba as a province or department of Spain, or by the people of the island." This debt had been mainly contracted for the purpose of supporting the Spanish Army in Cuba. The United States also declined to assume "the so-called Philippine debt," over one fourth of which had actually been transferred to Cuba to carry on the war against the Cuban insurgents. But the United States paid

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to Spain the sum of $20,000,000 for the cession of the Philippine Islands, an amount which was at least equal to the face value of that debt. Hershey, International Pub. Law, p. 135, note. See for an account of the negotiations relating to the Cuban debt, 1 Moore, International Law Dig. § 97.

A contrary view as to the obligation of the conqueror to assume that portion of the public debt chargeable to the annexed territory was maintained by Russia at the Congress of Berlin. "By the treaty of Berlin of July 13, 1878, Montenegro, Servia, and Roumania were declared to be independent, while Bulgaria became an autonomous and tributary principality. Stipulations were inserted as to the apportionment of the Ottoman debt, and as to the succession to Ottoman rights and obligations. No part of the Ottoman debt, however, was assumed by Russia on account of her acquisitions in Asia. It appears by the seventeenth protocol of the Berlin Congress that the Ottoman representative, on July 10, 1878, moved that Russia should assume that part of the Ottoman public debt which properly fell to the territory annexed by her. Count Schouvaloff replied that he considered it to be admitted that, if there was a partition of debts in respect of territories which were detached by means of arrangement, gift, or exchange from the country of which they formed a part, it was not so where there was a conquest. Russia, he added, was a conqueror both in Europe and in Asia; she was not obliged to pay anything for the territories, and would not recognize any obligation for the Turkish debt. Prince Gortchakoff declared that he opposed to the Turkish demand the most categorical refusal, and that he would not conceal the astonishment with which it inspired him. The president of the Congress observed that, in view of the opposition of the Russian plenipotentiaries, he could but recognize the impossibility of giving effect to the Turkish proposition." 1 Moore International Law Dig. p. 341.

In *Cessna* v. *United States* (1897) 169 U. S. 165, 42 L. ed. 702, 18 Sup. Ct. Rep. 304, it is said: "It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed upon every individual. There may be an exception when the dispossession and wrong of the grantor nation were so recently before the cession that the individual may not have had time to appeal to the courts or authorities of that nation for redress. In such a case perhaps the duty will rest upon the grantee nation."

As stated in WEST RAND CENT. GOLD MIN. CO. v. REX, the publicists generally concur in the opinion that the conqueror should be bound to fulfil the obligations of the conquered state. Although the observation made by Lord Alverstone (p. 402) upon the works of these writers, that their pronouncements, although of service in

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helping to create the opinion by which the range of the consensus of civilized nations is enlarged, are apt to be rather the embodiment of their views as to what ought to be from an ethical standpoint the conduct of nations *inter se*, than the enunciation of an established rule or practice, seems a just one, it seems proper to add to the list cited to the argument of counsel in the principal case.

The views of Hall, who says that the subject is one upon which writers on international law are generally unsatisfactory, for the reason that they are incomplete and they tend to copy one another, are summarized in 1 Moore, International Law Digest, p. 337, as follows: "Hall finds in the 'personality of the state' the 'key' to the answer to be given to the question of the relation of a new state to the 'contract obligations,' property, and privileges of the parent state. With rights acquired and obligations contracted by the old state in a 'personal' capacity, the new state has nothing to do. On the other hand, says Hall, 'rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and which has therefore a local character, or which, though not within it, belongs to state institutions localized there, transfer themselves to the new state person.' Likewise, the new state 'is not liable for the general debt of the parent state,' but 'it is saddled with local obligations, such as that to regulate the channel of a river, or to levy no more than certain dues along its course; and local debts, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it. . . . When part of a state is separated from it by way of cession, the state itself is in the same position with respect to rights, obligations, and property as in the case of acquisition of independence by the separate portion. To a certain extent also the situation of the separated part is identical with that which it would possess in the case of independence. It carries over to the state which it enters the local obligations by which it would under such circumstances have been bound, and the local rights and property which it would have enjoyed. In other respects it is differently placed. In becoming incorporated with the state to which it is ceded it acquires a share in all the rights which the former has as a state person, and it is bound by the parallel obligations. . . . When a state ceases to exist by absorption in another state, the latter in the same way is the inheritor of all local rights, obligations, and property.' Hall, International Law, 4th ed. 96–98, 104, 105."

In Hershey on Essentials of International Public Law, p. 131, it is said: "In case of total extinction and absorption or incorporation, the authorities are generally agreed that the annexing or absorbing state succeeds in the main to the rights and obligations of the extinguished state. . . . There is no reasonable doubt that the successor assumes responsibility for the financial obligations, more

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particularly the public debt, of the extinguished state. The former falls heir to the latter's assets, credits, revenues, and resources subject to the charges or burdens resting upon them. *Res transit cum suo onere.* Thus, the United States assumed the public obligations of the former colonies in 1789, the enlarged Sardinia or the new Italy took over the public debts of the lately annexed Italian states in 1861, as did Prussia those of the incorporated German states in 1866. In case there are several successors, the debt should be ratably divided, preferably in proportion to the revenues and taxable resources of that portion of the divided territory which each receives. In principle, the absorbing or incorporating state also succeeds to the contractual obligations of the extinguished state, at least as far as the rights of third parties are involved; and, *vice versa,* the contractual rights and obligations of the annexing state extend to the inhabitants and territory of the people absorbed. There are, however, important exceptions to this rule. It is clear that political (including personal and dynastic) treaties and alliances of the extinguished state fall to the ground. It is equally clear that transitory or dispositive treaties remain in force. Of such a character are stipulations respecting boundary lines, servitudes, or easements resting on the land relating to the use and repair of roads (including railways) or the navigation of rivers, etc. In these cases the rights of third parties, which it would be illegal to ignore or destroy, are involved. There is a serious difference of opinion in respect to treaties of commerce, navigation, extradition, etc. According to some authorities (*e. g.,* Despagnet, No. 91; 1 Piedelievre, No. 148; Rivier, pp. 72 ff.; 1 Westlake, p. 67 n.) such treaties are extinguished like those of a political alliance or friendship. According to another, but more infrequent, view, 'treaties of commerce and other international conventions which bind the annexed state' (1 F de Martens, p. 369) remain in force. There is a third opinion which considers 'a general answer to these questions based on principle, to be impossible, and leaves them to the nature and scope of the treaties and concrete circumstances for decision.' (Ullmann, 2d ed. p. 132. Cited by 1 Westlake, p. 67 n.) The better opinion (and the one most consonant with international practice) would seem to be that such treaties may be annulled at the option of the absorbing state. True it is that the rights and interests of third parties are affected; but the interests involved are for the most part economic or quasi political in their nature, and cannot as a rule resist the pressure of changed social and political conditions."

In Wilson on International Law, p. 51, it is said: "When the whole or a portion of one state becomes a part of another state as a result of conquest, cession, or otherwise, local obligations pass to the acquiring state. Contracts relating to the public interests of the acquired territory, entered into by the state formerly having sov-

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ereignty, are usually acknowledged by the new sovereign. Provisions to this effect occur in many treaties, and when not specifically mentioned such obligations are usually assumed, on proof that the claim is just and equitable." And on p. 369 the same author says: "If the whole state is completely conquered, there is no authority with which to make any treaty, and the rights and obligations belonging to the territory pass to the conqueror."

In Taylor on International Public Law, p. 201, it is said: "Whenever an entire state loses its identity by being absorbed into another, the absorbing power as the heir to its whole property naturally becomes liable for its entire debt, and at the same time extends its treaty obligations to the annexed territory. After the incorporation of Naples in the Kingdom of Italy, it was decided by the courts of both France and Italy that a treaty made in 1760 between France and Sardinia, relative to the execution of judgments of the courts of one within the limits of the other, applied to every part of the new Italian state into which Sardinia had expanded. When a state is annihilated, as in the case of the Kingdom of the Netherlands, and two entirely new and distinct states are created out of its fragments, neither of which represents the defunct nationality, what then becomes of its obligations? From Grotius we learn that, where a state is divided, 'anything which may have been held in common by the parties separating from each other must either be administered in common or be ratably divided.' Chancellor Kent made that vague rule a little more definite when he said that 'if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.' Phillimore, after quoting both Grotius and Kent, declared that 'if a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts.' So far as Phillimore is concerned there is no basis for Hall's statement that 'it is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the factions into which it is divided,' because he limits his comments to a case in which a nation is 'divided into various distinct societies.' In that event he says that prior obligations, in the absence of special agreement, are 'ratably binding upon the different parts.' Or as Heffter (§ 25) has expressed it: 'Property rights and duties of an entirely extinguished state survive its dissolution, subject only to a change in their administration; in cases of partition they devolve proportionately upon each of the dismembered parts. To that extent it may be said that the treasury of the absorbing state succeeds absolutely to the rights and duties of the extinguished

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one.' It may be true that new creations arising out of the annihilation of an older state, which they do not represent, are not legally bound to assume ratably a part of its general indebtedness,—that such obligation is purely a moral one. Whether moral or legal, the obligation of Holland and Belgium to bear ratably the general debt of the defunct Kingdom of the Netherlands was distinctly recognized and enforced in the treaty of 1839, in which the European Concert made an equitable settlement of all the interests involved."

According to Westlake, an exception to the application of the principle that the successor assumes responsibility for the financial obligations of the extinguished state exists where a loan has been contracted for the purpose of the war, which rests in extinguishment or absorption. 1 Westlake, International Law, p. 78.

A contrary view is expressed in Oppenheim, International Law, § 82.

The question under discussion is incidentally touched upon in the report of the Transvaal Concessions Commission, British State Papers, South Africa, 1901, as follows: "'10. Though we doubt whether the duties of an annexing state towards those claiming under concession or contracts granted or made by the annexed state have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice, as to warrant their being termed rules of international law, we are convinced that the best modern opinion favors the view that, as a general rule, the obligations of the annexed state towards private persons should be respected. Manifestly the general rule must be subject to qualification; *e. g.*, an insolvent state could not by aggression, which practically left to a solvent state no other course but to annex it, convert its worthless into valuable obligations. Again, an annexing state would be justified in refusing to recognize obligations incurred by the annexed state for the immediate purposes of war against itself; and probably no state would acknowledge private rights, the existence of which caused, or contributed to cause, the war which resulted in annexation.'" (Quoted from Wilson, International Law, p. 52.)

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[HOUSE OF LORDS.]

WEST LEIGH COLLIERY COMPANY, LIMITED, *Appellants,*

and

TUNNICLIFFE & HAMPSON, LIMITED, *Respondents.*

[1908] App. Cas. 27.
Also Reported in 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146.

Damage — Subsidence — Measure of damages — Risk of future subsidence — Remoteness.

In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account. To recover damages the surface owner must wait until the damage or injury caused by subsidence has happened.

Decision of the Court of Appeal, [1906] 2 Ch. 22, 75 L. J. Ch. N. S. 512, 94 L. T. N. S. 715, 22 Times L. R. 521, reversed; and decision of Swinfen Eady, J., [1905] 2 Ch. 390, restored.

(December 2, 1907.)

THE facts material to this appeal are stated in the judgments of Lord Ashbourne and Lord Macnaghten.

[28] **C. A. Russell, K.C., and Jessel, K.C. (Leslie Scott with them), for the appellants.** No cause of action arises until there has been an actual subsidence; and then compensation is due to the surface owner. Damages can be recovered every time that a subsidence happens. The mere apprehension of future subsidence, or the depreciation in the value of the property, is no element of damage. Otherwise compensation might be awarded more than once; there might be damages for an actual subsidence, plus the apprehension of a future subsidence, and then for that future subsidence when it happens. This is the doctrine laid down by Willes, J., in *Bonomi* v. *Backhouse* (1859) El. Bl. & El. 622, 654, and approved on appeal to this House (1861) 9 H. L. Cas. 503, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 769, 16 Eng. Rul. Cas. 216,

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13 Mor. Min. Rep. 677. In *Lamb* v. *Walker* (1878) 3 Q. B. D. 389, 47 L. J. Q. B. N. S. 451, 38 L. T. N. S. 643, 26 Week. Rep. 775, Cockburn, Ch.J., in dissenting from the other judges, excluded mere apprehension, even amounting to certainty, from consideration. Cockburn Ch.J.'s view of the law was expressly approved in this House in *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127, 55 L. J. Q. B. N. S. 529, 54 L. T. N. S. 882, 51 J. P. 148. Depreciation in value was also held not to be an element of damage in *Battishill* v. *Reed* (1856) 18 C. B. 696, 25 L. J. C. P. N. S. 290, and in *Rust* v. *Victoria Graving Dock Co.* (1887) 36 Ch. D. 113, 56 L. T. N. S. 216, 35 Week. Rep. 673.

Cripps, K.C., and **Langdon**, K.C. (**F. L. Wright** with them), for the respondents. The surface owner has a proprietary right to support, and compensation is due for subsidence and as often as there is a subsidence. But the subsidence involves a present deterioration in value, for which the surface owner is entitled to compensation. This is not covered by the damages payable on a second subsidence, for that subsidence is of an already diminished property. The original subsidence is of, say, property X; the subsequent one is of property X—Y, and unless Y is accounted for the owner suffers an injury for which he has received no redress. Compensation was allowed for the diminished value of property in *Cowper-Essex* v. *Acton Local Board* (1889) 14 App. Cas. 153, and the principle was recognized by Bowen, L.J., in *Mitchell* v. *Darley Main Colliery Co.* (1884) 14 Q. B. D. 125, 138, which was affirmed in this House. The question here is one rather of detail than of principle, and all that is contended for is that the present deterioration in selling [29] value brought about by a past subsidence is an element in the assessment of damages for that subsidence.

C. A. Russell, K.C., in reply.

The House took time for consideration.

Lord Macnaghten: My Lords, I agree with Swinfen Eady, J., and the late Lord Justice Sir R. Romer.

I think that this case is concluded by authority. In my opinion it is impossible to reconcile the judgment under appeal with the principles laid down in this House in *Backhouse* v. *Bonomi*

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(1861) 9 H. L. Cas. 503, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 769, 16 Eng. Rul. Cas. 216, 13 Mor. Min. Rep. 677, and *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127, 55 L. J. Q. B. N. S. 529, 54 L. T. N. S. 882, 51 J. P. 148.

It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner "may recover for that damage," as Lord Halsbury says in the *Darley Main Colliery Case,* 11 App. Cas. 127, at p. 135 "as and when it occurs." The damage, not the withdrawal of support, is the cause of action. And so the statute of limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation.

If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. That was the conclusion reached by Cockburn, Ch.J., in his dissentient judgment in *Lamb* v. *Walker* (1878) 3 Q. B. D. 389, 47 L. J. Q. B. N. S. 451, 38 L. T. N. S. 643, 26 Week. Rep. 775, which was approved in this House in the *Darley Main Colliery Case, supra.* I think, as the Chief Justice thought, that this conclusion necessarily follows from the principles asserted by the noble and learned Lords who took part in *Backhouse* v. *Bonomi, supra,* and particularly by Lord Cranworth and Lord Wensleydale. But if depreciation caused by apprehension of future mischief does not furnish a cause of action by itself, because there is no legal wrong, though [30] the damage may be very great, it is difficult to see how the missing element can be supplied by presenting the claim in respect of depreciation tacked on to a claim in respect of a wrong admittedly actionable.

If one examines this claim in respect of depreciation, and tries to investigate its origin, it will be found, I think, that it really depends upon a notion, which is now exploded, that the right of the surface owner is a right in the nature of an easement, or a

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right to have pillars of support left for his security, while, in reality, his right, as Lord Wensleydale observes, is merely the right of a landowner to the ordinary enjoyment of his land.

Speaking for myself, I cannot help thinking that a surface owner who complains of depreciation in the value of his property caused by underground workings is not wholly free from blame himself. In a sense it is his own folly. He has erected buildings or acquired buildings erected upon ground which is, or may be, undermined. So long as there are no underground workings, or it is taken for granted that his buildings rest upon a foundation that is solid throughout, all is well. But when it becomes known from some accident in the neighborhood, or from evidence given in court, or in some other way, that his buildings have beneath them a cavity or hollow, then people begin to think that it is probable, or at least possible, that some day his land, with the buildings upon it, may be let down. The secret has come out, and the character of his property suffers in public estimation. In truth, surface ground, with a stratum beneath it belonging to a different owner from which the minerals have been or are liable to be removed, is not justly entitled to the credit of absolute stability.

I am of opinion that the order appealed from should be reversed and the judgment of Swinfen Eady, J., restored, with costs here and below, and I move your Lordships accordingly.

Lord Ashbourne: My Lords, this action is brought to recover damages for injury by subsidence owing to the removal of minerals, and the official referee who considered the question of what damages the plaintiffs were entitled to awarded two separate sums. As to the cost of all the repairs necessary, he measured [31] the damages at the sum of 1,300*l.*, and he assessed the damages for the depreciation of the premises at 13,200*l.* It is the latter sum which has been the subject of controversy before your Lordships.

The broad objection urged against it by the appellants is that it is inconsistent with former decisions of this House in the well-known cases of *Backhouse* v. *Bonomi* (1861) 9 H. L. Cas. 503, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 769, 16 Eng. Rul. Cas. 216, 13 Mor. Min.

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Rep. 677, and *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127, 55 L. J. Q. B. N. S. 529, 54 L. T. N. S. 882, 51 J. P. 148. It was urged by the appellants that this large sum is mainly composed of an allowance for the risk of future damage, and that, as they must remain liable for any future subsidence if it occurs, they may thus have to pay twice over for the same loss. The excavations in themselves give no right of action. It is only the damage caused to the respondents' right of enjoyment of their property by a subsidence caused by the excavations that gives any right of action. Before any subsidence it might be that the known excavations and the fears resulting therefrom would cause a depreciation in the value of the property for which no action would lie. The fear of a subsidence, although founded on the known fact of extensive excavations, cannot give any cause of action, even although there may have been already a subsidence. This is clear from the two cases already referred to, and cannot now be questioned. If no action for interfering with the enjoyment of property can be brought before a subsidence, could it be urged that a comparatively small subsidence, the consequences of which could be repaired for far less than 1,300*l.*, would give a right to an inquiry for depreciation which might result in the large figure here awarded by the official referee? There is no secret about these large excavations. They are, I should think, always known to the owners and occupiers in the neighborhood. There may be a certain amount of uneasiness in the minds of those whose lands are near or adjoin, but each party has clear rights. The mine owner can excavate all he thinks worth taking, subject to the risk of an action on the part of those whose enjoyment of their property he may interfere with, and those who are so interfered with may bring actions as often as a fresh subsidence takes place and their enjoyment of their property is so interfered with.

[32] It has been strongly urged before your Lordships that if the depreciation in the present value of the property by the fear of future damage is not now compensated for, an injustice will be done to the owner, because a purchaser will now give much less for the property on which the subsidence has taken place. It is pressed that the loss that may so arise is part of the damage now recoverable by reason of the present subsidence. The Master

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of the Rolls puts it: "The first subsidence has established that the plaintiffs' mills are within the area of danger created by the act of the defendants. They have been changed from the position of premises presumably stable into that of premises presumably unstable." But the fact of the excavations was what constituted the area of danger and of fear, and that would not justify the owner on the occasion of the first subsidence in making such a claim. An owner can bring a fresh action for the damage caused by each fresh subsidence, but he cannot recover anything for the risk of future damage. To give damages for depreciation because a purchaser, from the fear of future damage, would give less after the subsidence, would be a method of doing that which the law as laid down in this House would not sanction.

Cockburn, Ch.J., well put the position in his judgment in *Lamb* v. *Walker* (1878) 3 Q. B. D. 389, which has been accepted as law: "Taking the view I do of the leading case of *Backhouse* v. *Bonomi, supra,* I am unable to concur in holding that in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say, anticipated damage expected to occur, but which has not actually occurred and which never may arise."

I am glad, however, to note that Swinfen Eady, J., did not limit his judgment to the 1,300*l.* for repairs, but has sanctioned a reference back to the official referee to "assess the damages in respect of depreciation of the premises." As the learned judge says: "A mill which has been much cracked and injured, and with walls bulging, and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured. The repairs are very far from entirely reinstating it, and the [33] loss to the plaintiffs is the same, whether the mill be sold and the loss realized, or whether the mill be retained by the plaintiffs, its value being reduced."

In my opinion the appeal should be allowed and the judgment of Swinfen Eady, J., restored, with costs here and in the court below.

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Lord James of Hereford: My Lords, it is after some hesitation, and with considerable reluctance, I have come to the conclusion that the judgment delivered by my noble and learned friend Lord Macnaghten contains a correct application of the principles of law governing this case. I come to that conclusion on the ground that the authorities quoted by my noble and learned friend bind us and must prevail.

Although I much doubt if justice to either party to this suit is certain to be secured by further litigation, I think it should be made clear that your Lordships' judgment proceeds upon the ground that, if further surface damage should occur, a just claim for damages may from time to time arise, and the plaintiffs in this action may make a further claim for damage at that time arising.

I would only add that, whilst I concur in the result of my noble and learned friend's judgment, I prefer for the present withholding my full acquiescence in the views expressed by my noble and learned friend towards the end of his judgment as to the rights of a surface owner for damage.

Lord Atkinson: My Lords, I concur. I admit that during the progress of the argument I entertained some doubt as to whether this case was covered by the authorities cited in your Lordships' House, to which my noble and learned friend Lord Macnaghten has referred. On consideration, however, I agree with him. In my view, to give damages for depreciation in the market value due to the apprehension of future injury by subsidence is to give damages for a wrong which has never been committed, since it is the damage caused by subsidence, and not the removal of minerals, which gives the right of action.

[34] **Lord Loreburn,** L.C.: My Lords, I have read the opinion just given by Lord Macnaghten, and I so entirely agree in his conclusion, and the reasoning by which it is reached, that little is left for me to add.

I see no middle course between saying one of two things—either a surface owner is to recover once for all the entire diminution in the value of his property which may arise from the fact that the mineral owner beneath him has excavated, or the surface

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owner can recover only for the actual physical damage so caused as and when it occurs. The former alternative would be inconvenient and capricious in its results; but it need not be discussed, because it is excluded by authority of the highest order. The latter is affirmed as law by equally high authority, and draws with it the result that the compensation disputed in this case cannot be allowed. To say that the surface land would sell for less because of the apprehension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future. Etymological confusion lies at the root of many difficulties, and perhaps there has been in this subject something of the kind in regard to the use of the word "damage" or "damages." Be that as it may, I am unable, with the utmost respect, to agree with the opinion of the majority of the Court of Appeal. I think this appeal ought to be allowed.

Order of the Court of Appeal reversed: Order of Swinfen Eady, J., restored, with costs here and below.

Lords' Journals, December 2, 1907.

Solicitors: *Fowler & Company, for Grundy, Lumb, & Grundy, Manchester; Patersons, Snow, Bloxan, & Kinder, for Wilson, Wright & Wilsons, Manchester.*

Note.—Measure and elements of damages recoverable for non-negligent interference with right of support.

The reason for limiting the scope of this note to cases in which there was no negligence in making the excavation which deprived the adjoining premises of their support is, that where there is negligence the right violated is not the same as the right which is violated where there is no negligence, so that the elements of damage, and conceivably the measure of damages, may be different. The difference may be comprehended in the statement that the cause of action in the one case is for negligence, in the other case, for nuisance.

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For example, as it is generally held that the right of lateral support extends only to support for the soil in its natural state, and does not include support for the protection of buildings or other structures placed upon it, no recovery can be had for injury to buildings or other improvements where there is no negligence in making the excavation, but where there is negligence, damages are recoverable for injuries to the buildings or other improvements as well as for the injury to the soil itself. In the latter case, possibly the measure of recovery might include prospective damages.

The mode of estimating the amount of damages recoverable is dependent on the conception entertained of the right of support. If that right is in the nature of a servitude and the injury is the disturbance of that servitude, the measure of recovery may comprehend the depreciation in the market value of the property occasioned by the possibility of further damages from the same cause, as well as the depreciation occasioned by the damage which has actually occurred. On the other hand, if the right for an interference with which an action will lie is considered not as an easement, but as a right to an undisturbed enjoyment of the property in its natural condition, then no recovery for future disturbances may be had, since the cause of action therefor has not yet come into existence.

Originally, the right of support seems to have been considered as a servitude to which the adjoining or subjacent property was subject; but as it sometimes happened that the injurious effects of excavations were not experienced until a long time after the excavation had been made, it became necessary, in order to prevent the statute of limitations from being pleaded in bar of an action by the owner of the injured property, to take the position that the disturbance of the surface, and not the withdrawal of the support constituted the wrong. See *Backhouse* v. *Bonomi* (1861) 9 H. L. Cas. 503, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 769, 16 Eng. Rul. Cas. 216, 13 Mor. Min. Rep. 677. This position may be said to have been the result of the balancing, on the one side, of the inconvenience to the person making the excavation in being required to defend an action or to pay damages long after the excavation had been made, and, on the other side, of the inconvenience of requiring the landowner, under penalty of being left remediless, to bring an action within the statutory period after the excavation had been made, when the possibility of actual or further damage resulting is still within the domain of speculation. Although this view may thus be said to have been dictated by considerations of convenience, rather than to rest upon any logical basis, the English courts have deemed it necessary also to adopt its logical corollaries, that subsequent actions are maintainable to recover damages for additional disturbances, notwithstanding a previous recovery for a previous disturbance resulting from the same excavation (*Darley Main Colliery Co.* v. *Mitchell* [1886] 11 App. Cas. 127, 55 L. J. Q. B. N. S.

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529, 54 L. T. N. S. 882, 51 J. P. 148; *Crumbie* v. *Wallsend Local Bd.* [1891] 1 Q. B. 503, 60 L. J. Q. B. N. S. 392, 64 L. T. N. S. 490, 55 J. P. 421); and that, in assessing damages, prospective damages arising from the risk of future subsidences must not be taken into account (WEST LEIGH COLLIERY CO. v. TUNNICLIFFE & HAMPSON).

Measure of damages generally.

The rule generally followed in the United States is that the measure of damages for the removal of lateral support is not the value of the earth which falls away (*Parrott* v. *Chicago G. W. R. Co.* (1905) 127 Iowa, 419, 103 N. W. 352; *Williams* v. *Missouri Furnace Co.* (1882) 13 Mo. App. 70; *McClelland* v. *Schwerd* (1907) 32 Pa. Super. Ct. 313), nor, ordinarily, the cost of restoring the property to its former condition, or of building a retaining wall (*Moellering* v. *Evans* (1889) 121 Ind. 195, 6 L.R.A. 449, 22 N. E. 989; *Schmoe* v. *Cotton* (1906) 167 Ind. 364, 79 N. E. 184; *Orr* v. *Dayton & M. Traction Co.* (1911) 178 Ind. 40, 48 L.R.A.(N.S.) 474, 96 N. E. 462, Ann. Cas. 1915B, 1277; *Gilmore* v. *Driscoll* (1877) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; *McGuire* v. *Grant* (1856) 25 N. J. L. 356, 67 Am. Dec. 49; *Ulrick* v. *Dakota Loan & T. Co.* (1891) 2 S. D. 285, 49 N. W. 1054), as in many cases this would be impossible except at a cost which would be wholly out of proportion to the actual damage (*McClelland* v. *Schwerd* (1907) 32 Pa. Super. Ct. 313); nor is it the loss of rentals therefrom (*Barry* v. *Chicago, I. & St. L. Short Line R. Co.* [1909] 149 Ill. App. 627); but the difference in the market value of the premises before and after the removal (*Schroeder* v. *Joliet* (1901) 189 Ill. 48, 52 L.R.A. 634, 59 N. E. 550; *Barry* v. *Chicago, I. & St. L. Short Line R. Co. supra; Moellering* v. *Evans* (1889) 121 Ind. 195, 6 L.R.A. 449, 22 N. E. 989; *Schmoe* v. *Cotton* (1906) 167 Ind. 364, 79 N. E. 184; *Orr* v. *Dayton & M. Traction Co.* (1911) 178 Ind. 40, 48 L.R.A.(N.S.) 474, 96 N. E. 462, Ann. Cas. 1915B, 1277; *Richardson* v. *Webster City* (1900) 111 Iowa, 427, 82 N. W. 920; *Parrott* v. *Chicago G. W. R. Co.* (1905) 127 Iowa, 419, 103 N. W. 352; *Kopp* v. *Northern P. R. Co.* (1889) 41 Minn. 310, 43 N. W. 73; *Schultz* v. *Bower* (1894) 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. 631, s. c. on subsequent appeal 64 Minn. 123, 66 N. W. 139; *Williams* v. *Missouri Furnace Co.* (1882) 13 Mo. App. 70; *McGuire* v. *Grant* (1856) 25 N. J. L. 356, 67 Am. Dec. 49; *Pullan* v. *Stallman* (1903) 70 N. J. L. 10, 56 Atl. 116, 15 Am. Neg. Rep. 125; *McClelland* v. *Schwerd* (1907) 32 Pa. Super. Ct. 313; *Ulrick* v. *Dakota Loan & T. Co.* (1891) 2 S. D. 285, 49 N. W. 1054).

In *McClelland* v. *Schwerd* (1907) 32 Pa. Super. Ct. 313, it was said, apropos of the holding that the value of the soil displaced, if such value is to be computed upon the loose dirt and rock that have

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fallen, is not ordinarily a reliable test of the pecuniary injury, that "possibly there might arise a case in which the loss of the soil would be so insignificant relatively as not to appreciably affect the selling or rental value of the lot or the owner's use and enjoyment of it. In such a case the market value of the lost soil, treated as a separate commodity, might be adequate compensation for the injury, but there is no natural or legal presumption, either prima facie or conclusive, that it would be such in all cases."

A similar rule has been followed in actions for damages for the removal of vertical support.

Thus in *Collins* v. *Gleason Coal Co.* (1908) 140 Iowa, 114, 18 L.R.A.(N.S.) 736, 115 N. W. 497, 118 N. W. 36, it is held that the measure of damages for injury to surface by mining operations is the difference between the value of the land immediately before the defendant commenced to remove the subjacent support and such value immediately thereafter, "lessened, if any, as a result of the mining . . . damaging the surface of said land, and the improvements of plaintiff thereon."

So also in *Jackson Hill Coal & Coke Co.* v. *Bales* (1915) — Ind. —, 108 N. E. 962, the measure of damages was held to be the difference between the value of the real estate immediately before and immediately after the subsidence, rather than the cost of restoring the premises to their original condition.

Where a building is injured by reason of the removal of its subjacent support, and the injury is of a permanent character, the depreciation of its market value is the measure of damages, and not the cost of repairing it, when such cost would be greater than the diminution in value, or when the repairing of the house would be practically impossible. *Piedmont & G. Creek Coal Co.* v. *Kearney* (1911) 114 Md. 496, 79 Atl. 1013.

The measure of damages for injury to property by undermining caused by the discharge of an hydraulic tunnel, by reason of which the property cannot be used as a site for heavy buildings, to which use it is adapted, is the diminution in value, notwithstanding the cost of constructing foundation walls of extraordinary depth extending below the disturbed strata would be less than the diminution in the value of the property, as the construction of such walls would not restore the property to its natural condition. *Barnett* v. *St. Anthony Falls Water Power Co.* (1885) 33 Minn. 265, 22 N. W. 535.

But unless care is taken to limit the estimate of the present market value of the property to its value in the condition in which it actually is, apart from any depreciation occasioned by the risk of further damages, the effect will be to permit the recovery of prospective damages.

This was guarded against in *Schultz* v. *Bower* (1894) 57 Minn.

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493, 47 Am. St. Rep. 630, 59 N. W. 631, in which the court, regarding the wrong as "not the excavation, but the act of allowing the other's land to fall," went on to state that "hence the measure of damages is the diminution of the value of the land by reason of the falling of the soil" (as distinguished from its diminution by reason of the excavation). Upon a subsequent appeal the court, in upholding instructions as to the measure of damages, stated that they substantially incorporate the law, which is, that the jury must "exclude any depreciation in the plaintiff's land caused solely by the existence of the excavation on the defendant's land." 64 Minn. 123, 66 N. W. 139.

And in *McGettigan* v. *Potts* (1892) 149 Pa. 155, 24 Atl. 198, it was held that the measure of damages in an action for the removal of lateral support is not the difference in the value of the land before and after the infliction of the injury, but the precise and actual damage done.

In *Noonan* v. *Pardee* (1901) 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 21 Mor. Min. Rep. 517, it was held that the measure of damages to a surface owner from removal of the support for his land by means of mining operations is the actual loss sustained to the land and buildings by reason of the cave-in, and not the difference in market value before and after the injury.

But in *Ulrick* v. *Dakota Loan & T. Co.* (1891) 2 S. D. 285, 49 N. W. 1054, the statement is made that where an excavation is made carefully and with proper regard for the rights of the adjoining owner, and injury ensues, the measure of damages is the diminution of the value of the land in consequence of such excavation.

And in *Weaver* v. *Berwind-White Coal Min. Co.* (1907) 216 Pa. 195, 65 Atl. 545, it was held that the measure of damages for permanent and irremediable injuries to land occasioned by failure to give surface support is the actual loss in the depreciation of the value thereof.

An instruction in an action for the wrongful removal of subjacent support that if the plaintiff has, since the supposed injuries occurred, been offered as much and could sell the property for as much as he paid for it, then he has not sustained any substantial damages, is flagrantly erroneous. *Penn* v. *Taylor* (1887) 24 Ill. App. 292.

The depreciation should be computed with reference to the plaintiff's property as a whole, and not with reference merely to the narrow strip along which the soil has fallen away. *Parrott* v. *Chicago G. W. R. Co.* (1905) 127 Iowa, 419, 103 N. W. 352.

It is a general rule, established by a line of decisions which need not be here cited, that an owner is entitled to support for his ground in its natural state, and does not include such support for the protection of buildings or other structures placed upon it.

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Accordingly, if the property be built upon, the diminution of the value of it as a whole, including the buildings, in consequence of the removal of lateral support and the falling of the soil, is not a reliable measure of damages, in the absence of negligence on the part of the defendant in making his excavation; for while the fact that the lot is built upon will not prevent recovery if the weight of the structures did not contribute to the falling away of the soil, yet the same principle which prevents recovery for a physical injury to the buildings also prevents recovery for a depreciation of their value considered either separately from or as part of the value of the land. *McClelland* v. *Schwerd* (1907) 32 Pa. Super. Ct. 313.

The owner of land which has been injured through the removal of lateral support cannot recover the difference in market value where it does not appear that the difference is wholly due to the injury to his natural right in the land. *Gilmore* v. *Driscoll* (1877) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37.

This rule does not, however, preclude the recovery of damages for injury to buildings where it can be proved that their weight did not cause the subsidence. See heading, "Recovery for collateral injuries," *infra.*

But, so far as the right to recover for injuries to buildings is concerned, the rule for the computation of damages for failure to furnish vertical support to the surface in mining underneath is not the same as the rule for the computation of damages for the removal of lateral support (*Noonan* v. *Pardee* (1901) 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 21 Mor. Min. Rep. 517); and in determining the difference in the value of land before and after the removal of subjacent support, the damage to improvements may be considered (*Collins* v. *Gleason Coal Co.* (1908) 140 Iowa, 114, 18 L.R.A.(N.S.) 736, 115 N. W. 497, 118 N. W. 36).

The reason for this difference is that where a severance takes place the grantee of the minerals is presumed to take subject to the right of the owner of the surface to erect or maintain thereon such buildings as may be necessary to the enjoyment of his estate. In *Gumbert* v. *Kilgore* (1886) 4 Sadler (Pa.) 84, 6 Atl. 771, the court charged the jury that the purchaser of coal in place is bound to sustain the surface in its natural condition, and if an ordinary house is put upon it by the owner of the surface, and by reason of nonsupport of the surface in that condition injury occur, he is liable in damages.

Although, as above stated, the cost of restoring the premises is not ordinarily the measure of recovery for the removal of lateral support, there are instances in which it has been so regarded.

Thus in *Stimmel* v. *Brown* (1885) 7 Houst. (Del.) 219, 30 Atl. 996, the court charged that the measure of damages for the removal of lateral support is the cost of restoring the property to as good a

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condition and as good a state of protection by lateral support as it had before the excavation was made.

The cost of erecting a retaining wall is a proper element to be considered in estimating damages for the removal of lateral support. *Aurora* v. *Fox* (1881) 78 Ind. 1.

In *Elshoff* v. *Deremo* (1896) 3 Ohio N. P. 273, 9 Ohio S. & C. P. Dec. 701, the jury was instructed that the plaintiff might recover what it would have cost at the time of the caving to restore the soil to its natural state, that is, to put back the soil as it originally was, but making no allowance for additional earth used in any terracing or otherwise.

In *Snarr* v. *Granite Curling & Skating Co.* (1882) 1 Ont. Rep. 102, an action for removal of lateral support, it was ordered that the defendants should restore plaintiff's land to its original position, that they should provide a support sufficient to maintain it in such position, and to replace the line fence on the boundary between the two properties.

But the plaintiff in an action for the removal of lateral support is entitled to recover only the cost of restoring his property to its former condition, and not the cost of a better and more expensive retaining wall. *Jones* v. *Greenfield* (1904) 25 Pa. Super. Ct. 315.

Where an easement of support for a house has been acquired, the measure of damages for its disturbance is the cost of putting the house in the same state it was before. *Hide* v. *Thornborough* (1846) 2 Car. & K. 250.

The cost of repair is, however, the ordinary measure of damages to buildings occasioned by removal of vertical support.

Thus, in *Donk Bros. Coal & Coke Co.* v. *Slata* (1907) 133 Ill. App. 280, and in *Donk Bros. Coal & Coke Co.* v. *Novero* (1907) 135 Ill. App. 633, it is held that while as a general rule the measure of damages in actions for injuries to real property is the difference in market value before and after the injury to the premises, such rule is subject to exception where the injury is to buildings, in which case the cost of repair or of restoring the premises to their original condition is the true and better rule to apply.

Where injuries occasioned by a subsidence of the surface of land are remediable, the cost of repair or restoration is obviously the measure of the damage. *Rabe* v. *Shoenberger Coal Co.* (1906) 213 Pa. 252, 3 L.R.A.(N.S.) 782, 62 Atl. 854, 5 Ann. Cas. 216, 19 Am. Neg. Rep. 527.

If the injury occasioned by failure to give surface support is reparable, the cost of repairing may be recovered, and if the cost of repairing is greater than the diminution in the market value the latter is the true measure of damages. In all such cases just compensation for the loss sustained by the trespass is what the injured party

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is entitled to recover. *Weaver* v. *Berwind-White Coal Min. Co.* (1907) 216 Pa. 195, 65 Atl. 545.

The measure of damages for causing a subsidence of the surface of land being the diminution in its market value, evidence was not admissible as to the value in themselves of springs destroyed (*Rabe* v. *Shoenberger Coal Co. supra*); but the value of springs as an element in estimating the value of the land, or the destruction of them in determining the depreciation in the value of the land after the injury, is a proper matter for the consideration of the jury (*Weaver* v. *Berwind-White Coal Min. Co. supra; Noonan* v. *Pardee* (1901) 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 21 Mor. Min. Rep. 517; *Jackson Hill Coal & Coke Co.* v. *Bales* (1915) — Ind. —, 108 N. E. 962 [where the injury was to a well]).

Prospective damages.

The right to recover prospective damages was inferentially recognized in the case of *Nicklin* v. *Williams* (1854) 10 Exch. 259, 13 Mor. Min. Rep. 650, in which it was held that an accord and satisfaction was a bar to a subsequent suit for damages thereafter arising from the same cause. Parke, B., in delivering the judgment of the court, said: "For this wrong the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and, if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong."

In *Stroyan* v. *Knowles* (1861) 6 Hurlst. & N. 454, an award of damages in respect of future deterioration was upheld.

In *Lamb* v. *Walker* (1878) 3 Q. B. D. 389, it was held by a majority of the court that though the removal of the adjacent strata is not tortious until the damage accrues, it becomes so as soon as any damage does accrue, so as to embrace the damage which may at any time arise from it, prospective as well as existent, and accordingly that the true measure of damages is the extent to which the estate is impaired or rendered less valuable. Inasmuch as this case is the chief exponent of the view opposed by WEST LEIGH COLLIERY CO. v. TUNNICLIFFE & HAMPSON, it seems desirable to set forth the reasoning of the judges therein somewhat at length. Manisty, J., in the course of his opinion said: "It may be said that it would be more just and equitable in a case like the present that the plaintiff should only be entitled to recover the amount of damage actually done to his property up to the time of bringing his action, leaving him to recover subsequent damage, if any, by a subsequent action, or, if need be, by a series of subsequent actions. . . . If that principle were

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adopted, one consequence would be that the statute of limitations would cease to be operative. A plaintiff might lie by until after the expiration of six years, without bringing any action, and then not only bring an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing. Again, take the case of slander actionable only by reason of special damage. The speaking of the defamatory word is *damnum absque injuria,* and consequently not actionable without special damage, just as the removal of the necessary support in the present case was *damnum absque injuria,* and not actionable until the plaintiff's property was injured, but I should suppose it would not be suggested that in such a case the plaintiff could only recover the damage actually sustained up to the time of bringing his action, and that for subsequent damage he might bring a subsequent action or a series of subsequent actions. The fact is that the principle hitherto acted upon, namely, that a plaintiff must recover once for all, by one and the same action, all damage, past, present, and future, resulting from one and the same cause of action, may not always insure perfect justice, but as a rule it is, in my opinion, a wholesome principle, and I doubt whether any better could be devised." And Mellor, J., concurring in the conclusion reached by Manisty, J., said: "The act done by the defendant, so long as he confined his excavations to his own property, was a lawful exercise of his right, but as soon as he, in the otherwise lawful exercise of his rights, excavated on his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act, *ipso facto,* became tortious, and the plaintiff became entitled to maintain his action. It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of the *'injuria* and *damnum'* which gives the right of action to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or in future, which result from the acts of the defendant, so become tortious, and whether he will bring his action immediately upon the manifestation of damage, or wait for further development of it, is at his option, but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief, subject to the risk arising under the statute of limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts." Cockburn, Ch. J., however, dissented, saying with reference to *Backhouse* v. *Bonomi, infra:* "The effect of the decision is that there is no abstract right to the support of the soil; consequently, that the withdrawal of the support does not create a wrong,—an *injuria absque damno;* it is only when the *damnum* presents itself, that that which has been done becomes

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wrongful. The *injuria* is the effect of the *damnum*. The act of the excavating owner is not tortious *in se;* it is tortious only when it produces, and, as it seems to me to follow logically, to the extent to which it produces, actual damage. This being so, it appears to me not only logically, but practically, inconsistent with this principle to hold that, because an adjoining owner has sustained actual damage to a limited extent, from excavation of adjoining soil, he can recover in the same action not only in respect of damage actually sustained, but also in respect of prospective damage which has not yet arisen, and which possibly never may arise at all. If permitted to do so he would thus be entitled to recover compensation in respect of a wrong which he has not as yet sustained,—a wrong as yet undeveloped and which has not yet in the legal view of the matter come into existence,—a proceeding at variance with all principle. Equally at variance with principle is it, when it is borne in mind that it is only by reason of and to the extent of realized damage that the act of the defendant becomes wrongful, to hold him responsible for that which, though it may possibly become wrongful hereafter, as yet is not so. Moreover, the defendant has, I apprehend, at any time before the damage has actually occurred, a perfect right to have recourse to any artificial means of which he can avail himself to prevent its occurrence. What, if some damage having occurred, so as to give the plaintiff a cause of action, the defendant were to have recourse to some possible means to arrest the further progress of the mischief; would the plaintiff be entitled, notwithstanding this, to recover in respect of the damage which might otherwise have arisen, but which has thus been averted? Can the plaintiff, by bringing his action immediately on the happening of a slight amount of damage, and claiming therein for prospective damage, which it is assumed will happen at some future time, thereby deprive the defendant of his right to prevent such future damage by recourse to artificial means? The law, beyond all question, allows him to avert all liability on account of possible damage in respect of the entire amount of damage which may result from his operations. If finding that some damage has arisen, possibly contrary to his expectations, he seeks to prevent further mischief, I am at a loss to see on what principle he is to be prevented from taking measures to do so. Yet such would be the effect of this decision. Of course I do not lose sight of the rule that damages resulting from one and the same cause of action must be assessed and recovered once and for all. But the rule seems to me to have no application in the present case, it being, in my view of the effect of *Backhouse* v. *Bonomi* (1861) 9 H. L. Cas. 503, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 769, 16 Eng. Rul. Cas. 216, 13 Mor. Min. Rep. 677, a mistake to say that the plaintiff had a right to the support of the adjacent strata, and that the removal of these constituted a violation of this right, by reason of

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which, when damage supervened, a cause of action arose. The plaintiff, as I read the judgment in *Backhouse* v. *Bonomi, supra,* had no right to the support of the strata. His only right was to the undisturbed enjoyment of his own property, and it was only when, and so far as, that enjoyment was interfered with, that he sustained a wrong. It is not enough to say that the value of the plaintiff's property has been diminished by the withdrawal of the support. It is not the diminished value of the property which makes the withdrawal of the support wrongful; otherwise any appreciable diminution in the value, consequent on the removal of the support, from prospective damage which might properly be anticipated to result from it, would constitute, independently of actual damage, a *damnum* in respect of which a plaintiff could recover, a position which, according to *Backhouse* v. *Bonomi, supra,* certainly cannot be maintained. It being thus the present and actual interruption of the plaintiff's enjoyment, and not the removal of the support, which constitutes the wrong and gives a cause of action, it must, as it seems to me, follow that a present interruption can only give a cause of action to the extent to which it has gone. It cannot constitute a cause of action in respect of a future interruption which has not yet occurred. The subsidence of a hundred yards which takes place to-day is one thing; the subsidence of another hundred yards, which takes place twelve months later, is not the effect of the first. It is in no way connected with it except so far as both are the effect of a common cause. Both, it is true, spring from the same cause, namely, the excavation of the subjacent strata; but as the excavation and the consequent removal of the support is not in itself wrongful, or a cause of action, the damage which happens at one time and that which happens at another, though arising physically from the same cause, cannot be said to arise from a common cause, or consequently from a common cause of action. Each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a further cause of action. It is not damage referable to a cause of action antecedent to itself."

In *Williams* v. *Missouri Furnace Co.* (1882) 13 Mo. App. 70, it is said with reference to the right to recover prospective damages in an action for the removal of lateral support: "This principle of embracing all damages, present and prospective, which it may reasonably be presumed will flow as a direct and natural consequence from the act done, in one assessment or award, applies in cases of the assessment of damages where private property is condemned for public works; and hence it is a rule of general application in such cases that no action at law can be maintained for damages subsequently accruing to the landowner from the constructing, maintaining, or operating of such public works, except where there is a subsequent injury or trespass, such as would not have been reasonably foreseen and taken into consideration in the original assessment, and the dam-

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ages arising from which are therefore presumed not to have been embraced therein, but which are predicated upon a subsequent tort as a separate and independent cause of action. 1 Thomp. Neg. 569, and cases cited. It is difficult to conceive of any reason which could be urged against the application of the rule which allows prospective damages in such a case as the one we are here considering, which could not, with equal reason, be urged against it in cases of personal injuries, and in the other very numerous cases where it is constantly applied. The principal reason which has caused the courts to hesitate in the adoption of the rule is the danger that it would lead the jury into the dominion of speculative damages; but this reason is overborne by the policy of preventing a multiplicity of suits, by requiring all damages, present and prospective, springing out of a wrongful act done, to be sued for and recovered in one suit."

In *McGowan* v. *Bailey* (1892) 146 Pa. 572, 23 Atl. 387, 17 Mor. Min. Rep. 425, an instruction conveying the idea that damages already suffered and damages likely to result from the removal of support in a coal mine underneath the plaintiff's property was approved.

In *Pantall* v. *Rochester & P. Coal & I. Co.* (1901) 18 Pa. Super. Ct. 341 (affirmed on other grounds in 204 Pa. 158, 53 Atl. 751), it was said that the recovery in an action for the removal of subjacent support might have comprehended not only the damages which had accrued at the time of the bringing of the suit, but also such damages as might be reasonably expected from the failure of the defendant in his mining to provide suitable support for the surface.

See also *Collins* v. *Gleason Coal Co.* (1908) 140 Iowa, 114, 18 L.R.A.(N.S.) 736, 115 N. W. 497, 118 N. W. 36, *ubi supra*.

On the other hand, the right to recover damages for prospective subsidences is denied in *Catlin Coal Co.* v. *Lloyd* (1902) 109 Ill. App. 122; and *Jackson Hill Coal & Coke Co.* v. *Bales* (1915) — Ind. —, 108 N. E. 962.

And in *Snarr* v. *Granite Curling & Skating Co.* (1882) 1 Ont. Rep. 102, it was held that, in estimating damages arising from the removal of lateral support, no sum should be allowed for damages to arise in future.

Recovery for collateral injuries.

In an action for the wrongful removal of lateral support, recovery may be had for such damage (apart from the injury to the premises) as the plaintiff can show to have been a necessary consequence of defendant's act. *Stimmel* v. *Brown* (1885) 7 Houst. (Del.) 219, 30 Atl. 996.

In *Pringle* v. *Vesta Coal Co.* (1896) 172 Pa. 438, 33 Atl. 690, it was held that the owner of the surface was entitled to recover com-

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pensation for such injury as he might show that he had sustained by reason of the subsidence of the surface.

The authorities are in conflict as to whether damages are recoverable for injuries to a building or other improvement which does not increase the lateral pressure on the adjacent land.

In the majority of cases it has been held that, where the soil would have given way without the added weight of the buildings upon it, the damage to the buildings is a consequence of the removal of lateral support and must therefore be the subject of compensation. *Hunt* v. *Peake* (1860) Johns. V. C. (Eng.) 705, 29 L. J. Ch. N. S. 785, 6 Jur. N. S. 107; *Brown* v. *Robins* (1859) 4 Hurlst. & N. 186; *Stroyan* v. *Knowles* (1861) 6 Hurlst. & N. 454; *Boyd* v. *Toronto* (1911) 23 Ont. L. Rep. 421.

In *White* v. *Tebo* (1899) 43 App. Div. 418, 60 N. Y. Supp. 231, 6 Am. Neg. Rep. 635 (reversed on other grounds in 168 N. Y. 149, 64 L.R.A. 275, 61 N. E. 169), it is held that where a structure does not increase the lateral pressure, damages are recoverable for injury thereto occasioned by the removal of lateral support, upon the ground that the act of the defendant being unlawful, he should be held liable for all damages necessarily flowing therefrom.

But in *Gilmore* v. *Driscoll* (1877) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37, the plaintiff's recovery of damages was confined to the injury to her soil, and she was not allowed compensation for the fence and shrubs on the ground, although it was conceded that the latter did not increase the lateral pressure.

Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful, and renders the defendant liable for all damages that result therefrom, as well to the buildings as to the land itself. *Wilms* v. *Jess* (1880) 94 Ill. 464, 34 Am. Rep. 242, 14 Mor. Min. Rep. 56; *Donk Bros. Coal & Coke Co.* v. *Novero* (1907) 135 Ill. App. 633.

Damages are recoverable for the destruction of a spring in consequence of the falling in of the surface caused by mining operations, to the extent to which the value of the plaintiff's property is thereby depreciated. *Barnes* v. *Berwind* (1883) 3 Pennyp. 140; and see also *Pringle* v. *Vesta Coal Co. supra; Gumbert* v. *Kilgore* (1886) 4 Sadler (Pa.) 84, 6 Atl. 771; and *Jackson Hill Coal & Coke Co.* v. *Bales* (1915) — Ind. —, 108 N. E. 962 (injury to well).

In *Kistler* v. *Thompson* (1893) 158 Pa. 139, 27 Atl. 874, the supreme court, in a *per curiam* opinion, approved of a charge to the jury in which they were instructed that if, by reason of the failure of a mine operator to leave sufficient support for the surface, the ground sinks, subsides, and cracks, and that sinking and cracking diverts a stream of water, then he will be liable, because that would be the direct result of his wrongfully withdrawing the support that is necessary and sufficient to sustain the surface.

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Where, by reason of the removal of the lateral support, land, over which an adjoining owner has a right of way, caves in, rendering the right of way useless and impassable, such adjoining owner may recover damages therefor. *Foley* v. *Wyeth* (1861) 2 Allen, 131, 79 Am. Dec. 771.

Where the abutting owner has title to the middle of the street, an injury to the surface thereof by a subsidence caused by the removal of subjacent support forms an element of his damage, though the public may also have been injured thereby. *Barnes* v. *Berwind* (1883) 3 Pennyp. 140.

Where the defendants, by removing the lateral support of their land, have caused the asphalt or pitch, which formed the main ingredient of the plaintiff's land, to melt and ooze forth into their own land, and thereupon appropriated it to their own use, damages are recoverable both for injury caused by subsidence of the surface of the plaintiff's land and for loss of the pitch. *Trinidad Asphalt Co.* v. *Ambard* [1899] A. C. 594, 68 L. J. P. C. N. S. 114, 48 Week. Rep. 116, 81 L. T. N. S. 132.

As the right of support is limited to the land in its natural condition, and does not extend to that which may be placed upon the land, one who, by reason of the crumbling away of the earth beneath his weight, is precipitated into an excavation on adjoining premises, cannot recover damages therefor. *Pullan* v. *Stallman* (1903) 70 N. J. L. 10, 56 Atl. 116, 15 Am. Neg. Rep. 125, the decision in which is also put upon the ground that the plaintiff was guilty of contributory negligence in going near the excavation.

But in *Mayhew* v. *Burns* (1885) 103 Ind. 328, 2 N. E. 793, it was held that one who excavates so near a division line as to cause the earth from the adjoining premises to fall into the excavation may be held liable for the loss of the life of a child of the owner of the adjoining property who falls into the excavation.

The loss of rental of a pasture by reason of the caving of the land into an adjoining excavation, carrying with it the line fence, whereby the fence was rendered useless and unfit to turn live stock, is too remote to be recoverable as consequential damages in an action for wrongful removal of lateral support. *Barry* v. *Chicago, I. & St. L. Short Line R. Co.* (1909) 149 Ill. App. 627.

Where by reason of mining operations the surface of land across which a highway ran subsided, necessitating the construction of an embankment for a railway which crossed the highway, the mine owners are not liable for the obstruction of the highway by the embankment. *Atty. Gen.* v. *Conduit Colliery Co.* [1895] 1 Q. B. 301, 64 L. J. Q. B. N. S. 207, 15 Reports, 267, 71 L. T. N. S. 777, 43 Week. Rep. 366, 59 J. P. 70. E. S. O.

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[PRIVY COUNCIL.]

THE ROUMANIAN.

[1916] A. C. 124.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

Prize court — Enemy cargo in British ship — Outbreak of hostilities — Diversion to British port — Part cargo discharged into oil tanks — Liability to seizure.

A cargo of petroleum oil in bulk, owned by a German company, was shipped at a neutral port on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain and Germany and was diverted by her owners to Purfleet, where, under their orders, she proceeded to discharge the oil into tanks on shore. When the larger part of the oil had been so discharged the whole cargo was seized as prize. It was subsequently condemned as lawful prize and as droits of admiralty:—

Held—(1) that the cargo was not immune from condemnation by reason of having been shipped in a British vessel before the outbreak of hostilities; (2) that the jurisdiction of the Prize Court extended to the oil seized while in the tanks, since that jurisdiction depended not upon the situation of the oil when seized, but upon the fact that it was seized as prize; (3) that, the whole cargo having become liable to seizure and condemnation upon the outbreak of hostilities, the oil discharged into the tanks did not cease to be so liable by reason of the discharge, and that this was the case whether or not the tanks formed part of the port.

The Ooster Ems (1784) 1 C. Rob. 284, note, discussed and explained.

(November 10, 1915.)

Present: Lord Mersey, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Edmund Barton.

Appeal from a decree of the Prize Court (England), December 7, 1914; reported L. R. [1915] Prob. 26, 31 Times L. R. 111, 59 Sol. Jo. 206.

The appeal related to a cargo of about 6,264 tons of petroleum oil shipped on July 24, 1914, at Port Arthur, Texas, on

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board the British tank steamer Roumanian for delivery at Hamburg.

The cargo was the property of the appellants, the Europäische Petroleum Union, a company incorporated and registered in [125] Germany. On August 4, 1914, when the vessel was in the English Channel and bound for Hamburg, war broke out between Great Britain and Germany. At the suggestion of the Lords Commissioners of the Admiralty the owners of the vessel diverted her to a port in the United Kingdom (Dartmouth) for orders. From that port they ordered her to proceed to Purfleet and there to discharge the oil into tanks belonging to the owners of the wharf. The vessel was moored to the wharf at Purfleet on August 21, 1914, and proceeded to discharge the oil into the tanks, which were situated about 100 to 150 yards from the vessel, by means of pipe lines worked by the ship's pumps. The oil could not be removed from the tanks without the sanction of the customs. On August 22, 1914, when the greater part of the oil had been so discharged, a letter from the custom-house officer at Gravesend addressed to the master was delivered on board, stating that the whole cargo was "placed under detention." The discharge into the tanks was completed on the following day.

On September 15, 1914, a writ was issued on behalf of the respondent, the Procurator General, against the Roumanian and her cargo for the condemnation of the cargo as prize and droits of admiralty. The writ was served by attaching it to the tanks.

The appellants claimed the release of the cargo, or that it should not be condemned, or, if ordered to be sold, that the proceeds should be paid into court and should remain in court till the termination of the war.

The action was tried by the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans), who, by a considered judgment delivered on December 7, 1914, condemned the whole cargo as lawful prize and droits of admiralty.

Maurice Hill, K.C., and **C. R. Dunlop** (**Balloch** with them), for the appellants. The notice of August 22, 1914, that the cargo was "placed under detention" did not constitute a seizure as prize. In any event a large part of the oil had at that time been pumped into the tanks, and that part was consequently seized on

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land. Except in the case of a seizure by a naval force on shore, goods seized upon land are not within the jurisdiction of the Prize Court nor subject to condemnation as prize. The effect [126] of the Order in Council of 1665, set out in *The Rebeckah* (1799) 1 C. Rob. 227, at p. 231, 1 Eng. P. C. 118, at p. 121 and referred to by the learned President in *The Miramichi* L. R. [1915] Prob. 71, at p. 81, has been misapprehended. In that Order goods in port means goods afloat in port. Moreover, the object of the Order was not to define the limits of prize jurisdiction, but to lay down the respective rights of the Crown and of the Lord High Admiral. Rothery's Prize Droits, pp. 13, 14.[1] Neither the terms of the Order in Council of August 5, 1914, Manual of Emergency Legislation, 1914, p. 248, nor the forms prescribed by the Prize Court rules are consistent with, or applicable to, the seizure of goods upon land. There is considerable authority of jurists that prize jurisdiction is confined to the high seas and territorial waters. Halleck's International Law, vol. 2, chap. 22, § 2 (4th ed. p. 98); Oppenheim's International Law, vol. 2, art. 145 (2d ed. p. 182); Westlake's International Law, 2d ed. part 2, p. 145; Story on Prize (Platt's ed. 1854), pp. 58, 59. There are no reported cases of seizure of goods upon land, except where they have been taken by a naval force acting ashore. In *Lindo* v. *Rodney,* reported in a footnote to *Le Caux* v. *Eden* (1781) 2 Dougl. K. B. 594, at p. 612, note, Lord Mansfield elaborately considered the foundation and nature of prize jurisdiction, and, in justifying a seizure of goods upon land by a naval force, said, "the prey is, as it were, killed at sea, and taken upon land." In *The Two Friends* (1799) 1 C. Rob. 271, 1 Eng. P. C. 130, Sir W. Scott was satisfied that there could have been no valid seizure upon land unless there had been a capture at sea. He said: "I know no other definition of prize goods than that they are goods taken on the high seas, *jure belli,* out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this court." The learned judge in that case distinguished *The*

[1] A report made in 1857 by Mr. H. C. Rothery, C.B., Registrar of the High Court of Admiralty (1853 to 1878), to the Lords Commissioners of the Treasury, first printed in 1915 and published under the above title by the authority of H. M. Stationery Office.

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Ooster Eems (1784) 1 C. Rob. 284, note, 1 Eng. P. C. 136, note, pointing out that Lord Thurlow had there stated that the goods then in question had not been captured at sea, and upon [127] that ground had held that they could not be seized upon land. [*The Hoffnung* (No. 3) (1807) 6 C. Rob. 383; 1 Eng. P. C. 583; *The Charlotte* (1807) 6 C. Rob. 386, note, 1 Eng. P. C. 585, note, and *Brown* v. *United States* (1814) 8 Cranch, 110, 3 L. ed. 504, were also referred to.] The learned President on the present point cited two cases mentioned in Mr. Rothery's report, namely, *The Berlin Johannes,* Rothery, p. 125 and *The Marie Anne,* Rothery, p. 126. In the first of those cases the ship was captured in the Thames. The second is distinguishable in that the contract of carriage was subsisting, the goods having been warehoused temporarily during repairs to the ship. Moreover, Mr. Rothery's report was made solely with the object of ascertaining what proportion of the proceeds of captured goods had in practice been given to the captors, and the facts of the cases are only stated so far as they are relevant to that question. In *The Thalia* (1905) 2 Russian and Japanese Prize Cases, 116, the ship was ashore below high-water mark, but in any case the seizure was by a naval expedition. The Inner Temple library contains bound records (formerly belonging to Dr. Lushington) in some thousand appeals from British and Colonial Prize Courts, and it is remarkable that, with the possible exception of one case from Ceylon, which was reversed upon appeal, not one of those cases relates to a seizure upon land.

But even if the right to seize goods in port is not limited to goods afloat in port, the tanks did not form part of the port. In the passage in Hale's De Portibus Maris (Hargrave's Law Tracts, pp. 46 et seq.), referred to by the President, the author is not considering the limits of prize jurisdiction, but is describing the legal conception of a port in its widest sense. He recognizes that for certain purposes the description is too wide, as at p. 76 he speaks of "the very port, *viz.,* that part of the port where ships come to unlade their goods." So far as prize jurisdiction is concerned "port" includes nothing above high-water mark. [Port of London act 1908 (8 Edw. VII. chap. 68), sched. V., was referred to.] If the tanks are to be regarded as a warehouse the effect of § 493 of the merchant shipping act 1894, as to the preser-

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vation of the [128] shipowner's lien is not to make the possession of the warehouseman the possession of the shipowner.

Further, enemy goods shipped upon a British ship before the outbreak of war are not liable to condemnation in a British Prize Court. This contention was not developed in the court below, since the learned President had already rejected it in *The Miramichi,* L. R. [1915] Prob. 71, and in *The Aldworth* (1914) 31 Times L. R. 36, 59 Sol. Jo. 75. The only goods liable to seizure under international law are enemy goods upon enemy ships. Westlake's International Law, part 2, p. 145; Lawrence's Principles of International Law, 4th ed. p. 461; Coen on the Declaration of London, p. 139; Taylor's International Law, p. 723; Bentwich's War and Private Property, p. 79. The Declaration of Paris, the Declaration of London, and The Hague Conventions are all based upon the assumption that enemy goods in national ships are immune from seizure. The protection of the flag applies after the outbreak of hostilities. The forms given in the Prize Court rules are drawn up in accordance with the established practice, but there is no form applicable to a seizure of goods in a British ship. So, too, the board of trade circular issued to shipowners on August 15, 1914,[1] is entirely inconsistent with the existence of the right, which is also ignored by the Naval Prize Manual 1904. If the right exists, enemy goods shipped before the outbreak of war in a British ship are placed in a worse position than if shipped in a neutral vessel. Indeed, having regard to the days of grace allowed to enemy ships to leave British ports, enemy goods may be in a better position in an enemy ship than in a British ship. So far as the object of seizure is to prevent enemy goods from reaching their owner, that object is attained by the common-law rule and the statutory provisions against trading with the enemy. There is no case in the English Prize Cases, nor in Pritchard's Digest of 1848, which deals with the seizure of enemy goods in a British ship, and until the recent decision in *The Juno* (1914) 112 L. T. N. S. 471, 31 Times L. R. 131, 59 Sol. Jo. 251 there is no reported case of a claim for freight by a British shipowner in respect of enemy goods seized upon his ship. In *The Venus,* Rothery, p. 129, mentioned in

[1] The purport of this circular appears from the judgment at *post*, p. 942.

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Mr. Rothery's report and [129] referred to by the President, it does not appear that the question was argued; further, the seizure was made at a time when breaches of international law took place by way of reprisals. In both *The Conqueror* (1800) 2 C. Rob. 303 and *The Mashona* (1900) 10 Cape Times L. R. 163, cited by the President in his judgment in *The Miramichi,* L. R. [1915] Prob. 71, the goods had been shipped after the outbreak of war. In the Russian and Japanese war both nations observed the rule contended for. See Russian regulations, Russian and Japanese Prize Cases, vol. 1, appendix A, p. 311; Japanese regulations, Russian and Japanese Prize Cases, vol. 1, appendix B, p. 431. The French regulations in the present war also accord with the appellants' contention. See Manual of Emergency Legislation, supplement No. 3, pp. 574, 575.

Sir Edward Carson, A.G., **Sir Erle Richards,** K.C., and **T. Mathew,** for the Procurator General, were not called upon.

The judgment of their Lordships was delivered by

Lord Parker of Waddington: This appeal relates to the cargo *ex* steamship Roumanian. The relevant facts are quite simple, and are not in dispute.

The Roumanian is a British ship, and on August 4, 1914, the day on which war broke out between this country and Germany, was on a voyage from Port Arthur, Texas, to Hamburg, with a cargo of some 6,264 tons of petroleum belonging to the Europäische Petroleum Union, a German company. On the same day the Admiralty through the secretary of Lloyd's suggested to the owners that the ship should be diverted to some port in the United Kingdom, and the owners accordingly instructed the master to proceed to Dartmouth for orders. The ship arrived at Dartmouth on August 14, 1914.

On August 15 the board of trade issued a notice containing recommendations with regard to the treatment of cargoes belonging to an enemy in ships diverted from their original ports of destination. These recommendations appear to their Lordships to be so conceived as in no way to prejudice the liability (if any) of such cargoes to be seized as prize. It was recommended that the cargo should be landed at a dock, legal quay, or sufferance

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wharf, either in the port [130] at which the steamer had arrived or in some other safe port, and warehoused subject to shipowners' and other charges until sale or disposal could be arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority to the claims of the persons entitled to the cargo or its proceeds. Obviously, if the cargo were liable to seizure as prize, seizure followed by condemnation in the Prize Court would entitle the Crown either to the cargo itself or the proceeds thereof, subject to such shipowners' or other charges as might, by law, take precedence of the Crown's interest.

On August 20 the Roumanian proceeded to London, arriving at Purfleet at noon on August 21. Before her arrival arrangements had been made to warehouse the petroleum in the tanks of the British Petroleum Company, Limited, at Purfleet, and permission had been obtained from the customhouse authorities for its discharge into these tanks. When so discharged the petroleum would be in the custody of the customhouse authorities in the sense that it could not be removed therefrom without their sanction.

The work of discharge accordingly commenced at 12.15 P. M. on August 21, the petroleum being pumped into the tanks, which were situated some 100 to 150 yards from the wharf at which the vessel lay. Meanwhile the customhouse authorities took samples in order to test the specific gravity of the oil and ascertain whether or not it was dutiable. About 7 P. M. on August 22 a letter from the customhouse at Gravesend was delivered on board the Roumanian, addressed to the master, stating that the cargo of about 6,264 tons of petroleum was placed under detention. This letter was not received by the master till 11 P. M. Roughly speaking about 1,140 tons of oil remained undischarged at 7 P. M. and 570 tons at 11 P. M. on August 22. Notwithstanding the letter above referred to, the work of discharging the oil continued. It was completed long before the writ in these proceedings, which did not issue until September 19, and was served by affixing the same to the tanks in which the petroleum was then warehoused.

It will be observed that the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was

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accordingly argued on behalf of the appellants that there was no [131] effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the customhouse is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter. The point, however, is of little importance in the view their Lordships take of the points of law, which will be dealt with presently, for if there was no seizure by delivery of the letter there was admittedly a good seizure when the writ was served.

Under these circumstances three points were raised by counsel for the appellants. They contended, first, that, so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; secondly, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the Roumanian; and, thirdly, that enemy goods on British ships at the commencement of hostilities either never were, or, at any rate, have long ceased to be, liable to seizure at all. Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in *The Miramichi,* L. R. [1915] Prob. 71. Their Lordships have carefully considered the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasizing the fact that in the case of *The Juno* (1914) 112 L. T. N. S.

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471, 31 Times L. R. 131, 59 Sol. Jo. 251, no authority could be found for the right of the master of a British ship on which [132] enemy goods were seized as prize to compensation in lieu of freight, though if such goods were properly the subject of prize the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in text-books on international law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law, the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor as a general rule do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives color to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war. Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. Moreover, the decisions, such as they are, certainly do not support, but indeed contradict, the appellants' contention. It is clear, from the cases cited in *The Miramichi, supra,* that enemy goods embarked on British ships during the hostilities are the subject of prize. See, in particular, *The Conqueror* (1800) 2 C. Rob. 303. In these cases the sole question decided has been

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the enemy character of the goods, and no stress has been laid on the time at which they were [133] embarked, or on whether any person concerned had or had not been guilty of the common-law offense of trading with the enemy. Further, there is the case of *The Venus* referred to in Rothery's Prize Droits at p. 129.

Their Lordships have thought it desirable to examine the papers preserved in the Record Office in connection with that case, the facts of which are as follows: *The Venus* was a British ship which at the outbreak of hostilities was on a voyage to Hamburg. Its cargo had been shipped at Genoa, Ancona, and Mentone. The master, hearing of the outbreak of war and desiring to avoid the risk of his ship being captured by the enemy, put into Plymouth. The receiver of admiralty droits at Plymouth, suspecting upon information given by the master that part of the cargo belonged to enemy subjects, seized both ship and cargo. The shipowners put in a claim for the release of the ship on the ground that it was British and also for freight expenses and demurrage. The ship was ordered to be released. The claim for freight and expenses was allowed, there being a reference to the proctor to ascertain the proper amount, which was declared a charge on the cargo. The claim for demurrage was disallowed. The amount to be allowed for freight and expenses was in due course certified by the proctor, and apparently paid out of the proceeds of the cargo which had been appraised and sold under the direction of the court. Parts of the cargo or its proceeds were subsequently claimed by and released in favor of neutrals. The residue of the cargo was condemned as the property of enemy subjects.

The case of *The Venus* appears, therefore, to be an authority against the appellants' contention. They say, truly, that the point does not seem to have been raised, but it is far more likely that the point was not raised because it was thought to be untenable than that the court overlooked what, according to the appellants' contention must have been a well-known principle of prize law. Further, *The Venus* is certainly an authority in support of the President's decision in *The Juno, supra.* Curiously enough, the master of *The Venus,* though a British subject, is in the proctor's report in the case of that ship referred to as the

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"neutral master," a fact which is only consistent with the practice of the court in allowing [134] freight being the same whether the enemy goods were seized on neutral or on British ships.

With regard to the general statements contained in text-books on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from Westlake's International Law, part 2, p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows: "We may therefore conclude that enemy ships and enemy goods on board them are now by international law the only enemy property which as such is capturable at sea." In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken apart from the context as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that because the writer in the present case uses the expression "capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbors were, notwithstanding the Declaration of Paris, still subject to capture. Such statements are in any case more than counterbalanced by statements contained in other well-recognized authorities. Thus, in addition to the passages quoted in *The Miramichi,* L. R. [1915] Prob. 73, at p. 79, from Dana's edition of Wheaton's International Law, it will be found that Halleck (International Law, 4th ed. vol. 2, p. 98) states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods, and not the nationality of the ship on which they are embarked or the date of embarcation, which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in *The Rebeckah* (1799) 1 C. Rob. 227, of the manner in which the Order of 1665 defining admiralty droits has been construed by usage.

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Passing to the appellants' third argument, that based on the [135] Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbors of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognizes that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (International Law, part 2, p. 145), it assimilates neutral ships to neutral territory, recognizing that on both the authority of the neutral state ought (except possibly in the case of contraband) to be exclusive. So far, the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships. The cases are not *in pari materia*. If the Crown has ceased to exercise its ancient

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rights to seize and appropriate the goods of enemy subjects on land, it is because the advantage to be thus [136] gained has been small compared with the injury thereby entailed on private individuals, or in order to insure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right to seize and appropriate enemy goods on the high seas or in territorial waters or the ports or harbors of the realm has never been allowed to fall into desuetude. In order in the fullest degree to attain this advantage of sea power our courts have always upheld the right of seizing such goods even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war, or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise.

Their Lordships hold, therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, always were, and still are, liable to be seized as prize, either on the high seas or in the ports or harbors of the realm. It follows that the petroleum seized on board the Roumanian was properly condemned as prize.

The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the Roumanian. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land, and not afloat, it is not, they contended, the Prize Court, but some

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court of common law, which has jurisdiction to determine the rights of all parties interested. In [137] their Lordships' opinion, this contention also fails. The chief function of a Court of Prize is to determine the question, "prize or no prize," in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question the local situation of the goods at the time of seizure may be of importance, but it is the seizure as prize, and not the local situation of the goods seized, which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *Lindo* v. *Rodney,* reported in a note to *Le Caux* v. *Eden* (1781) 2 Dougl. K. B. 594, at p. 612, note. It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that in the case before him the commission under which the court derived jurisdiction conferred jurisdiction in all cases of prize whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the commission which constitutes it a Court of Prize. To give the Court of Admiralty, as such, jurisdiction the matter complained of must have occurred on the high seas, but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty by virtue of the commission which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of *The Ooster Eems* (1784) 1 C. Rob. 284, note, to which, for the reasons hereinafter mentioned, no great weight can be given.

Their Lordships will now proceed to consider the appellants' contention that, even if the Prize Court had jurisdiction, it ought nevertheless to have decided against the condemnation of the petroleum in question so far as it was not actually afloat on board the Roumanian at the time of seizure. They admitted that during the war no order for restitution or release could properly be

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made in favor of the German owners, but they suggested that the proper course was to hand the petroleum over to the public trustee or [138] some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited.

The real question is whether the petroleum in question is, according to the law administered by Prize Courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbors of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth or thence to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Company, Limited? In the course of the argument counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was suggested, and their Lordships have been unable to discover one for themselves. The argument of counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbor, and that the tanks of the British Petroleum Company, Limited, could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of afloat or ashore is no infallible test as to whether goods can or cannot be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize. The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *Brown and Burton* v. *Franklyn* (1705) Carth. 474, quoted in Lord Mansfield's judgment above referred to. Brown and Bur-

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ton, the masters of a vessel belonging to the East India Company, seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and, [139] having obtained a condemnation of the property as prize, proceeded against Brown and Burton for an account. The latter instituted proceedings at common law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *Lindo* v. *Rodney* (1781) 2 Dougl. K. B. 612, note, expressly approves an admission made by counsel in that case to the effect that it would be "spinning very nicely" to contend that, if the enemy left their ship and got on shore with money, and were followed on land and stripped of their money, this would not be a lawful maritime prize. If this be, as it seems to their Lordships to be, good law, the present is an *a fortiori* case. In the case put by counsel the landing of the goods was made by the enemy with the object of escaping capture afloat. In the present case the landing was by British subjects who had the enemy goods in their possession, and did not know what else to do with them, and were pursuing a course recommended by the board of trade and in no way intended to prejudice the Crown's rights.

With regard to the authorities quoted in this connection they have, in their Lordships' opinion, with one possible exception, no real bearing on the point. In *The Hoffnung* (No. 3) (1807) 6 C. Rob. 383, the cargo seized on shore had been landed and sold prior to the declaration of war. These goods, therefore, even if enemy goods at all, were never liable to seizure as prize. They were not, in fact, seized, nor was any proceeding taken against them, but an attempt was made to recover against the ship which had brought them the value of the goods so sold, the ship itself belonging to a neutral. This claim was rejected by the court. It was held that unless it could be shown that the hand of capture had been employed on these goods in quality of cargo the court could not go back to affect them in any other character. The same principle was recognized in *The Charlotte* (1807) 6 C. Rob. 386, note, 1 Eng. P. C. 585, note, in which it was held that the proceeds of goods landed and sold prior to the seizure of the ship, and never themselves seized, were not amenable to the jurisdiction of the court. In *Brown* v. *United States* (1814)

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8 Cranch, 110, 3 L. ed. 504, it was decided on the facts that the goods in question were in the position of enemy goods found on American soil at the [140] commencement of the hostilities, and not, therefore, the subject of maritime prize. That case, therefore, is clearly distinguishable from the present.

The only case which raises any difficulty is that of *The Ooster Eems* (1784) 1 C. Rob. 284, note. There is no satisfactory report of this case. It is mentioned in the note on p. 284 of 1 C. Rob. and in the preface to Hay and Marriott's Decisions, p. XXVII. Their Lordships have, however, examined the papers relating to it preserved in the Record Office. *The Ooster Eems* was a Prussian, and therefore a neutral vessel. She was stranded on the Goodwin Sands on a voyage from Texel to the East Indies. Before she broke up, part of her cargo was sent ashore, including some boxes of silver coin. The latter were deposited by the master with the Prussian consul at Deal. One Jeremiah Hartley, an officer of the Court of the Cinque Ports, acting under an order of attachment issued by that court sitting as an Admiralty Court, seized and obtained possession of the goods so landed, including the boxes of silver, on behalf of the warden of the Cinque Ports. The seizure may have been intended to be a seizure of enemy goods as maritime prize, though their Lordships have been unable to ascertain that the Court of the Cinque Ports had any jurisdiction in prize. The warden took no proceedings, either in his own or any other court, with a view to having the goods lawfully condemned. The master, therefore, obtained from the High Court of Admiralty in England a monition requiring Jeremiah Hartley and the warden and all others whom it might concern to appear and proceed to the legal adjudication in that court whether the goods seized were lawful prize or not. The King's Proctor subsequently intervened. Certain depositions were filed which appear to raise some suspicion that the goods were Dutch and therefore enemy goods, but there was no real evidence to that effect. The master deposed that he did not know to whom the goods belonged, and under these circumstances one would have expected that the court would have acted on the presumption arising from the fact that the ship was a neutral ship. The court, however, made an interlocutory decree condemning the goods on the ground that the goods, which

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apparently were assumed to be enemy goods, were not at the time of seizure "in a privileged vehicle or on neutral territory." All questions between the Crown [141] and the warden were reserved. The master appealed to the Lords Commissioners of Appeal in Prize, and on that appeal the order for condemnation was discharged, not on the merits, but, in the words of the Privy Council Journals, on the ground that "the High Court of Admiralty in England, the court appealed from, had not a jurisdiction over the goods seized and proceeded against in this cause."

The records of the Privy Council do not contain any note of the reasons which led to this decision. It would appear, however, from the case of *The Two Friends* (1799) 1 C. Rob. 271, that Lord Stowell had before him some note of these reasons, for he represents Lord Thurlow as saying that "the goods in question had never been taken on the high seas, but had only passed in the way of civil bailment into civil hands, and were afterwards arrested as prize." If this be correct, it may mean that in the opinion of the Lords Commissioners it is the local situation of the goods seized as prize, and not the seizure as prize, which determines the jurisdiction of the Prize Court, a decision diametrically opposed to the judgment of Lord Mansfield in *Lindo* v. *Rodney* (1781) 2 Dougl. K. B. 612, note, which had been pronounced only three years previously. On the other hand, it may mean that the goods in question were not liable to seizure as prize because they were not on the high seas but on land, in which case Lord Thurlow was deciding the very point which he held the Court of Admiralty had no jurisdiction to decide, and he ought to have ordered the restitution of the goods to the master instead of leaving that somewhat hardly used individual to his remedies at common law, in the assertion of which he would have in some way or other to get over Lord Mansfield's judgment to the effect that prize or no prize could only be determined in a Prize Court.

Moreover, it is almost impossible to suppose, in the then state of the authorities, that Lord Thurlow thought that to constitute lawful prize the seizure must have been on the high seas. It was already well settled that enemy ships and goods in the ports or harbors of the realm were the subject of Maritime prize. It was equally well settled that enemy goods on enemy territory seized by the maritime forces of the Crown, or persons having

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letters of marque, could properly be condemned as prize. If, therefore, he used the [142] expressions attributed to him by Lord Stowell some other explanation must be found.[1]

In their Lordships' opinion a reasonable explanation of the case and of Lord Thurlow's words may be found in the following consideration. It appears that the Court of the Cinque Ports in its capacity as an Admiralty Court had taken possession of the goods at the instance of the Lord Warden. There was, therefore, a matter pending in the Court of the Cinque Ports which, so far as their Lordships can discover, was not a Court of Prize. The effect of the monition was to remove this matter to the High Court of Admiralty for trial there. In so trying it the High Court would be exercising an admiralty, and not a prize, jurisdiction. As appears by Lord Mansfield's judgment in *Lindo* v. *Rodney, supra,* in order to found an admiralty jurisdiction the complaint must be made of something done on the high seas. This explanation would fully account for the words used by Lord Thurlow, though it must be admitted that Lord Stowell took a different view as to what he meant. In any event their Lordships do not consider that *The Ooster Eems* (1784) 1 C. Rob. 284, note, has any value as an authority. It has never been followed, and, apparently, has been cited twice only, and in each case distinguished. It is so cited and distinguished in *The Two Friends, supra,* above referred to and also in *The Progress* (1810) Edw. Adm. 210.

In the last-mentioned case certain British ships with their cargoes had been captured by the French. It is not clear whether they were captured at sea and taken into Oporto after the French occupation, or whether the French found them in the harbor of Oporto when they took possession of it. The French appear to have landed part of the cargoes which was warehoused on shore at the time when the military forces of the Crown took Oporto It was, however, held upon the facts that there had

[1] The record in the appeal to the Lords Commissioners of Appeal in Prize in *The Ooster Eems* is to be found among a bound collection of similar records in the library of Lincoln's Inn. There is added a MS. note recording the judgment, but no reasons appear. Lord Stowell (then Mr. William Scott) seems to have appeared as counsel in the appeal; his reference in The Two Friends to Lord Thurlow's judgment may therefore have been from his own note.—Rep.

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been a capture by the French and a recapture by the military forces of the Crown of both [143] ships and cargoes. Lord Stowell allowed a claim for salvage on the part of the military authorities in respect of that portion of the cargoes which had been landed as well as of the ships and that portion of the cargoes remaining on board. He distinguished *The Ooster Eems, supra,* on the ground, as their Lordships understand the decision, that the master of *The Ooster Eems,* in landing the goods, was acting within his authority derived from the owners of the goods, whereas the landing in the case he was considering had been effected by persons acting without authority from and contrary to the interests of the owners. The same ground of distinction would appear to be applicable to the case their Lordships are considering. The petroleum was not warehoused pursuant to any authority given by the owners, but in breach of the contract for its carriage to Hamburg, and so far as the owners were concerned this was as much a hostile act as the landing of the goods by the enemy captors in the case of *The Progress, supra.* In neither case, to use Lord Stowell's expression, was the continuity of the character of the goods landed as cargo in any way interrupted.

There are only two other cases which need to be referred to in this connection. The first is that of *The Marie Anne,* Rothery, p. 126. In that case, at the outbreak of the war with France on May 16, 1803, *The Marie Anne,* a French ship, was under repair at Ramsgate, and certain parts of her cargo had been landed and were warehoused. Both the ship and the goods so landed were seized as prize and in due course condemned as such. There is no record of the reasons which influenced the court. It may be that the warehouses in which the goods were deposited were considered as part of a harbor or port of the realm, so as to bring the case within the ordinary definition of goods liable to seizure as prize. It may be that the goods, having been temporarily landed while the vessel was repaired, were still considered as part of the cargo though not actually on board. The case, however, is clearly inconsistent with the proposition that goods seized on land cannot be lawful prize. The same may be said of the case of *The Berlin Johannes,* Rothery, p. 125, if, as would appear to be the case, the goods already landed were seized and condemned as prize.

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[144] If these decisions turned on the question whether the goods though landed were still in port, they are authorities against the appellants, for no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbor by sea and the tanks in which, in the present case, the petroleum was stored.

Their Lordships, therefore, have come to the conclusion that the petroleum on board the Roumanian, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Limited, for safe custody, and that therefore its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbors of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Ince, Colt, Ince, & Roscoe.*
Solicitor for respondent: *The Treasury Solicitor.*

Note.—When property on land may be subject of maritime prize.

The principal decision on the question above stated is *Brown* v. *United States* (1914) 8 Cranch, 110, 3 L. ed. 504, cited in THE ROUMANIAN, where it was held that timber floated from a ship into a salt-water creek where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water and prevented from floating away at high water by booms, was to be considered as on land in determining the right to confiscate it as belonging to the enemy.

In Re *680 Pieces of Merchandise* (1863) 2 Sprague, 233, Fed. Cas. No. 12,915, it was held that the admiralty jurisdiction of a United States district court was sufficient to embrace the case of a capture by a naval force of enemy's property found on a wharf, having lately

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been ferried across a river occupied by the Federal naval forces for all purposes of war.

In Re *1253 Bags of Rice* (1862) Blatchf. Prize Cas. 211, Fed. Cas. No. 10,535, rice in lighters, and also rice not water-borne when seized, but stored in a warehouse contiguous to a river communicating with Charleston harbor, was held to be the subject of maritime capture and properly confiscable as prize, being enemy property captured by public vessels in an enemy port. The same case seems to have been informally reported under the title *United States* v. *703 Casks of Rice,* Fed. Cas. No. 16,253b.

The Ooster Eems, as reported in 1 C. Rob. 284, note (a), "was the case of a ship stranded on the Godwin Sands, on a voyage from the Texel to the East Indies. The cargo was sent on shore, and, amongst the rest, some boxes of silver were deposited with the Prussian consul. The warden of the Cinque Ports claimed the cargo as the property of enemies, being become a perquisite of admiralty within that jurisdiction. The master obtained a monition from the High Court of Admiralty to arrest the goods and remove the cause from the Cinque Ports to the Prize Court, where he gave a claim for the cargo as Prussian property. The cargo was condemned, but, on appeal, that sentence was reversed; and the Lords pronounced, 'that the High Court of Admiralty had not a jurisdiction over the goods seized and proceeded against; and they reversed the decree appealed from, for want of jurisdiction.' Lords, July 14, 1784."

On the question of the status of a corporation as an alien enemy, see *Continental Tyre & Rubber Co.* v. *Daimler Co. ante,* 304.

E. S. O.

[ENGLISH PRIZE COURT.]

THE MARIE GLAESER.

L. R. [1914] Prob. 218.
Also Reported in 31 Times L. R. 8, 59 Sol. Jo. 8.

Prize court — Neutral rights under enemy flag — Status of enemy merchant ships at outbreak of hostilities — Hague Convention 1907, No. 6, art. 3 — Claims of shareholders, necessaries men, and mortgagees — Bounty of Crown.

A vessel flying the German flag left her last port of departure some hours before the declaration of war between Great Britain and Germany, and was encountered and captured by a British cruiser on the high seas while still ignorant of the outbreak of hostilities:—

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Held by the President (Sir Samuel Evans), that as Germany had not reciprocally accepted the terms of art. 3 of The Hague Convention 1907, No. 6, the vessel could be condemned and sold by a British Prize Court, and not merely conditionally detained.

The vessel at the time of her capture, though in the possession of her owners, a German limited liability company, was subject to a bona fide mortgage to a Dutch company domiciled at Dordrecht, and it was claimed that, as, according to German law, some kind of "property" in the vessel had passed to the mortgagees, the Crown should, out of the moneys realized by the sale of the vessel, apply such portion of it as would meet the mortgage:—

Held by the President, that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of the captured vessel must be rejected, and that the same conclusion would be arrived at if the claim were by British subjects; but the Crown being entitled to captured property could, out of its bounty, deal favorably with such claims.

Held, further, that the affidavit filed by agents on behalf the German owners of the vessel was, as in the case of *The Chile* (L. R. [1914] Prob. 212, 31 Times L. R. 3, 58 Sol. Jo. 852), insufficient to show any right for enemy owners to put forward a claim, for it failed to indicate that the hostile character of the owners had been, in the circumstances, in any way suspended, and, therefore, the appearance of the German owners of the vessel would be struck out, and the appearances entered by sparate shareholders would not avail them as they had taken shares in respect of a vessel with an alien flag; but as regarded neutrals and British subjects, it was open to the Crown [219] to exercise the prerogative of bounty, a prerogative which could also be applied to those who had appeared on the ground of having advanced money for necessaries, etc.

(September 16, 1914.)

On August 1, 1914, the German screw steamship Marie Glaeser (Albert Schroder, master), of 1,317 gross and 812 tons net register, of the port of Rostock, owned by a limited liability company of Rostock, left Bristol for Archangel in ballast. On August 4 she put into Barry for bunker coal, and left the same day at 1 P. M., the declaration of war between Great Britain and Germany taking effect at 11 P. M. on that day. On August 5, about 4 P. M., she was captured at sea by H.M.S. Gibraltar, and the master (a German) of the Marie Glaeser was informed that war had broken out between Great Britain and Germany. A prize crew having been put on board, the vessel proceeded to Glasgow, arriving there on August 6, when the ship's papers were handed over to the collector of customs, and on August 17 a writ was issued and served in an action instituted in the Prize

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Court by the Procurator General against the owners and parties interested in the ship Marie Glaeser, seized and taken as prize, and for the condemnation thereof.

Appearances were entered on behalf of (1) the German steamship limited liability company owning the vessel; (2) separate shareholders in the ship, Fry & Company, Glaeser, and Cennynck; (3) De Eerste Nederlandsche Scheepsverband Maatschappij, of Dordrecht, in the Kingdom of Holland, mortgagees; (4) a firm of Harper, Seed, & Company, of Newcastle, claiming for disbursements, and another firm of H. G. Harper & Company (represented by one Petersen, the agent of the owners of the vessel), claiming for brokerage and necessaries, and A. Lutze & Company, also claiming for necessaries.

The case is reported on the question of the nonapplication, in the circumstances, of art. 3 of The Hague Convention 1907, relative to the status of enemy merchant ships at the outbreak of hostilities,[1] and as to the rights (if any) of British, neutral, [220] or enemy, mortgagees, of the Marie Glaeser as against the captor.

Sir Stanley Buckmaster, S.G., and **G. W. Ricketts**, for the Crown.

Lewis Noad, for owners, including British shareholders, and others claiming for necessaries, disbursements, and brokerage.

Leslie Scott, K.C., and **L. F. C. Darby**, for the mortgagees.

All the material facts, together with the arguments of counsel and the cases referred to by them, fully appear from the following judgments delivered by—

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1 Hague Convention, 1907 (Blue Book, Miscellaneous, No. 6, 1908, p. 70), art. 3: "Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers.

"After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war."

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Sir Samuel Evans, President. This vessel, the Marie Glaeser, was clearly, according to the ship's papers, a German vessel under a German master with a German crew, flying the German flag, and she was captured at sea on August 5, that is to say, after hostilities had broken out. The declaration of war between this country and Germany took effect as from 11 P. M. on August 4. The vessel had left Barry some hours previously, and it is admitted that at the time of the capture the master was not aware that hostilities had broken out between Germany and this country. The question of whether and how far the provisions of the sixth Hague Convention of 1907 are binding upon this court is one which has been left undecided up till now, but which will have to be decided in some case, I have no doubt, in the near future. But it is not necessary to have regard to the convention of 1907 at all with reference to this particular case, because the circumstances are similar to those described in art. 3 of the sixth convention. To that article Germany did not agree; she made a reservation in respect of it; and therefore she would not in any event be entitled to any benefit which might accrue from the terms and the conditions [221] laid down by that article. This vessel accordingly is a fit subject for condemnation, and I decree the condemnation of the vessel, and order the vessel to be appraised and sold by the marshal of the court.

Now various claimants have appeared here, and I will take them in the order in which their cases have been put before the court. In the first place, an appearance has been entered at the request of a gentleman who says he acts as agent for the owners of the vessel. Now it is admitted that the owners of the vessel are German subjects. The affidavit in this case partakes of the same character as the affidavit in the case of *The Chile,* L. R. [1914] Prob. 212, 31 Times L. R. 3, 58 Sol. Jo. 852, that is to say, it is wholly insufficient, as it does not show or tend to show any special circumstances which would entitle the enemy owner of the ship to appear in this court. According to order iii., r. 5, of the Prize Court rules 1914, before an appearance can be entered an alien enemy must file in the registry an affidavit stating the grounds of his claim. That does not mean merely that he must file an affidavit stating the contentions which he will lay before the court, but it must be an affidavit stating that notwith-

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standing the fact that he is in ordinary circumstances an alien enemy, yet there are special circumstances which he can set forth entitling him to enter an appearance and be heard in this court. A reference was made when this subject-matter was before the court on the last occasion to some authorities upon the point, and I will deal with them very shortly now. In the case of *The Panaja Drapaniotisa* (1856) 2 Eng. P. C. 560, Dr. Lushington in his reserved judgment said: "The principle is this,—that to support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a *locus standi.* No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral states resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims." Certain forms of [222] affidavit which were then in use are set out in the judgment in that case, and, though those forms of affidavit are no longer in use in this country, the affidavits which lead to the filing or the entering of an appearance in prize cases in this court ought substantially to conform to the substance of the affidavits which were in vogue in 1856. They ought to state clearly what the position of the owner of the vessel is, what his nationality is, and if it appears that he is an alien enemy in the ordinary course, the circumstances ought to be stated in the affidavit showing upon what grounds he claims to be standing in some character other than that of an alien enemy for the purpose of being heard in this court. In the case of *The Felicity* (1819) 2 Eng. P. C. 233, at p. 236, reported originally in 2 Dodson, Adm. at p. 381, Lord Stowell says this: "In the present case it is contended that the hostile character was disarmed by a license, and I see no reason to dispute either the existence of the license or its authority," in support of his claim. In the case of *The Troija* (1854) 1 Spinks, Eccl. & Adm. 342, Dr. Lushington says this: "I entertain no doubt as to the correct practice in such cases, it is that when an enemy claims he must show a *persona standi in judicio,* the law being that an alien

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enemy is not entitled in any way to sue in this or in any other court." That follows what was laid down by Lord Stowell in the case of *The Hoop* (1799) 1 Eng. P. C. 104, at p. 107, 1 C. Rob. 196, namely, that "in the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio.* The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice.* But otherwise he is totally *ex lege;*" and the law is succinctly put by Story, J., on Prize Courts, at p. 21: "Nor can an enemy interpose a claim unless under the protection of a [223] flag of truce, a cartel, license, pass, treaty, or some other act of the public authority suspending his hostile character."

In this particular case there is nothing in the affidavit which tends to show that the hostile character of the owners of this vessel is suspended in any way, nor is there any suggestion made by those who wanted to be heard in favor of the owners that there was anything in the nature of a license to trade or a pass, or that there were any circumstances whatever differentiating the case of this alien enemy from that of any other alien enemy who might be affected by a decision of this court. Therefore, both on the ground of insufficiency of affidavit and on the ground that I am satisfied that there are no substantial special circumstances which could be put in any other affidavit, I hold that the appearance ought not to stand, and I strike it out.

Now the other persons who have claimed are shareholders, mortgagees, and people who have incurred expenses for the vessel, for necessaries, brokerage, or other disbursements. Now, with regard to the shareholders in a vessel, it is quite clear that if they are enemy shareholders, their property must go with the capture of the vessel in which they have put their money,—a vessel which sails under the enemy flag. Nor only is that so with regard to shareholders who are citizens of the German Em-

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pire, but it is equally so in the case of shareholders belonging to this country. If a shareholder invests his money by taking shares in a vessel which is liable to capture, he takes that risk. Of course if a British shareholder likes to present his case to the Crown as a case which ought to be dealt with as a matter of grace, that is another thing. I have nothing to do with that; I am here only to administer the law, and I must decide that the shareholders in this case have no right whatever in law to be protected from any results of the capture of this vessel.

Similarly with regard to the persons—British citizens—who have advanced sums of money in various ways, or who may have claims for services rendered in the nature of brokerage, or otherwise, to this vessel. Here again, sitting as a judge of the Prize Court, I cannot give effect to any such claims. If they are to be allowed it will be from the bounty of the Crown, and as the Solicitor General has said, from what we know of what takes [224] place in this country, any claim which they put forward in the right quarter will no doubt be fairly considered and generously treated by those who have a right to deal with these matters.

With regard to the claim of the mortgagees, Mr. Leslie Scott has stated that there is no decision in this court by my predecessors against the claim put forward by mortgagees to have the mortgage debt paid out of the proceeds of the sale of the ship. In deference to his argument, and as it is a matter which affects, no doubt, very many people both in this country and abroad, I will—although I have very little doubt about what my judgment will be—look further into the questions he has raised, and will pronounce judgment upon this part of the case at an early date.

The decree I now make is that the vessel was properly seized as a prize of war at sea, and that she is subject to condemnation, and that I do condemn her and order her to be sold.

The Solicitor-General. Your Lordship will give me liberty to apply?

The President. I will give you liberty to apply.

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On the question of the mortgage held by the Dutch company judgment was reserved.

Sir Samuel Evans, President: This merchant vessel, belonging to enemy owners, was captured at sea on August 5 last by H.M. cruiser Gibraltar, and has already been condemned by the court as lawful prize. She was a German vessel, registered at the port of Rostock, owned by a German limited company, commanded by a German master, and flying the German flag.

A claim has been made on behalf of certain mortgagees, who are neutrals,—a limited liability company in Holland. Counsel who appeared for them did not contest the legality of the capture of the vessel, nor oppose the judgment of condemnation. The claim he put forward was that a sufficient sum out of the proceeds of sale of the prize should be set aside to satisfy the amount which might be found due to the mortgagees, on the ground that [225] they were, as neutrals, entitled to have their property or interests protected. He contended (1) that no case in the English Prize Court had dealt with the claim of a neutral mortgagee in a sense adverse to the claim now put forward; (2) that the decisions in our Prize Courts touching liens (as for example *The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456), were not applicable to the case of mortgages, on the ground that some kind of "property" in the ship passed to and vested in mortgagees; and (3) that in any event at the present day the international law of prize should be extended and applied so as to protect mortgages held by neutrals in accordance with what he contended was the policy and principle upon which the Declaration of Paris was founded.

As I intimated at the conclusion of the argument last week, I did not feel much doubt as to what the judgment of the court ought to be; but as the question arose in many other cases of neutrals, and in similar cases of British subjects also, and particularly as the court was asked to enunciate what appeared to be new law, judgment was reserved for maturer consideration.

It will be convenient first to set out a few facts as to the mortgage. It was executed on June 26, 1905, by Otto Zelck (a subject of the German Empire) as manager of the German limited liability company known as the Steamship Company

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Marie Glaeser in Rostock in favor of a Dutch company called Eerste Nederlandsche Scheepsverband Maatschappij in Dordrecht, Holland, on certain conditions for a loan of 172,500 marks. The operative part of the mortgage was in these terms (translated):—

"I grant by these presents to the Dutch company a mortgage on the steamer Marie Glaeser registered in the ship's register in Rostock, amounting to M.172,500 Germany currency."

The repayment with interest was spread over a term extending up to December, 1917; but in certain events the whole was made repayable immediately. Among the conditions were the following (translated):—

Sec. 3. "Moreover the Dutch company will be authorized, without any further formality, to insure the vessel against [226] imminent risk of war for the account of the mortgagor (borrower) at the utmost for the double of the moneys which have been advanced to the mortgagor (borrower), should the mortgagee (lender) be of opinion that such a risk is really imminent. . . ."

Sec. 5. "The moneys which have been paid off (reimbursed) are either to be fully extinguished on the object of the loan, or the priority must be secured to the mortgagee (lender) for the remainder of his claim above (before) the amount of the claim that has been paid off (reimbursed), even though therefore subrogation in favor of a third party should have taken place; if not, the Dutch company is authorized to claim without delay and any notice the reimbursement of the loan which has been granted, together with all accrued interests and expenses. . . ."

Sec. 6. "The Dutch company will be authorized to claim without delay and any notice the reimbursement of the loan, together with the accrued interests and expenses:—

"I. Should the vessel get lost or be condemned. . . .

"III. Should the vessel be alienated entirely or partly, or should the ship business be stopped. In the event of alienation, should the transfer (transmission) of the debt unto the acquirer not have taken place with the authorization of the Dutch company, the mortgagor (borrower) has to pay to the Dutch company, besides the loan together with the accrued interests, a commission for renunciation, amount to 1 per cent (one per

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cent). The mortgagor (borrower) is bound to inform the mortgagee (lender) without delay of every transaction by which the property of the mortgaged vessel is transferred (transmissed) entirely or partly to another party or other parties. . . .

"VI. In the event under I. the Dutch company is authorized to endeavor to make good her claim from the insurance policies, save her personal claims against the mortgagor (borrower) respectively his assigns. In the cases under II. to VI. the Dutch company is authorized, without the serving of a writ being previously required, to endeavor to enforce her claims on the vessel and her appurtenances. The mortgagor (borrower) remains by all means personally responsible towards the Dutch company for an eventual unexpected loss."

Sec. 8. "All disputes arising between the mortgagor [227] (borrower) and the Dutch company are to be submitted to the competent Court of Justice of Hamburg."

It is stated in the affidavit in support of the claim that the amount remaining due was 69,000 marks. The mortgage was duly entered in the ship's register in Rostock.

It is not disputed that the mortgage represented an honest business transaction. The mortgagors remained, and were at the time of the capture, in possession of the vessel. No reference to the mortgage was entered upon any of the ship's papers.

With regard to the first two contentions of counsel for the claimants, even if there were no decision of our Prize Courts dealing with the claim of a mortgagee, a principle ought to be deducible, and in truth can clearly be deduced, from cases dealing with liens upon, or claims in respect of, captured vessels, the application of which should be decisive of the case now before the Court.

But it is not quite accurate to say that our Prize Courts have never adjudicated upon claims of a neutral mortgagee.

In *The Aina* (1854) Spinks, 8, 2 Eng. P. C. 247, a claim was made by a person alleged to be a neutral who was mortgagee of one-third part of a captured enemy ship. Two questions there arose: (1) Whether the claimant was a neutral; and (2) whether, supposing him to be a neutral, he would be entitled to come to the Prize Court and claim one third of the ship by virtue of the mortgage. It is true that the court decided that the claim-

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ant was not a neutral, and that was enough to support the decision. But the court also unequivocally stated that even if he were a neutral his claim could not be sustained. Dr. Lushington said:—

"If I am to do it in the present case, innumerable questions would arise, and the court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the law of the country where it was executed."

With regard to the authorities generally, the first and leading case usually referred to is *The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456. Counsel for the [228] claimant sought to distinguish that case, and even invoked the aid of certain passages or phrases in the judgment.

The claimant in that case was a British subject; the claim was founded upon a bottomry bond on a French vessel executed by her master to the claimant before hostilities between Great Britain and France had commenced. The claim was rejected upon the broad ground that the court recognized no liens upon a captured vessel, with the special exception of some liens attaching by the general law of the mercantile world independently of contract. Lord Stowell in his judgment says:—

"It is a case of a bottomry bond given fairly in time of peace, without any view of infringing the rights of war, to relieve a ship in distress,—a contract certainly regarded with great attention and tenderness by this court when brought immediately before it. But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a Court of Prize? The total silence of those who have argued for the claimant as to any precedents for this demand strongly shows that it has not been the practice of the court to consider such bonds as property entitled to its protection; and I think I may venture to say that there has been no such instance. The person advancing money on bonds of this nature acquires by that act no property in the vessel; he acquires the *jus in rem,* but not the *jus in re,* until it has been converted and appropriated by the final process of a Court of Justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more. If there is no change of property, there can

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be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and, amongst the rest, the chances of war."

It may be observed in passing that by the mortgage in the case now before the court the risk of war was expressly mentioned, and the mortgagees had the right at the expense of the mortgagors to insure against it if they thought war was imminent.

Then Lord Stowell, having dealt with the exceptional cases of [229] "an interest directly and visibly residing in the substance of the thing itself" (as freight on cargo), proceeds:—

"But it is a proposition of a much wider extent which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from the neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts, and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. In like manner his rights operate on no such liens where the property itself is protected from capture; indeed, it would be almost impossible for the captor to discover such liens in the possession of the enemy upon property belonging to a neutral. The consequence, therefore, of allowing generally the privilege here claimed would be that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property. This court, therefore, excludes all considerations of liens or encumbrances of this species. On the whole, I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the Prize Court, however much the Court of Admiralty may be disposed to uphold them in the other branch of its jurisdiction when they are brought directly before it."

The passages above quoted were expressly adopted by the Privy

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Council in 1857 in *The Ariel,* 11 Moore, P. C. C. 119, at p. 129, 2 Eng. P. C. 600; and the substance of the decision in this last case is succinctly stated towards the end of the judgment delivered by Sir John Patteson as follows:—

"Liens, whether in favor of a neutral on an enemy's ship, or in favor of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

It was contended that a claim under a mortgage was in some [230] essential respects different from that under a bottomry bond. It is difficult to see in what respects, so far as regards the functions of a Prize Court.

It may be noted that by the municipal law of this country the claim of a mortgagee, whether in possession or not, ranks below the claims of persons who have maritime liens on the mortgaged ship, *e.g.,* for bottomry, salvage, and wages. See *The Duke of Bedford* (1829) 2 Hagg. Adm. 294; *The Bold Buccleugh* (1851) 7 Moore, P. C. C. 267, 284; *The Mary Ann* (1865) L. R. 1 Ad. & El. 8, 35 L. J. Prob. N. S. 6, 12 Jur. N. S. 31, 13 L. T. N. S. 384, 14 Week. Rep. 136; *The Feronia* (1868) L. R. 2 Ad. & El. 65, 37 L. J. Prob. N. S. 60, 17 L. T. N. S. 619, 16 Week. Rep. 585, and *The Ripon City,* L. R. [1897] Prob. 226, at p. 243, 66 L. J. Prob. N. S. 110, 77 L. T. N. S. 98, 8 Asp. Mar. L. Cas. 304.

So, if the mortgagees of the Marie Glaeser had been British subjects, and the effect of the mortgage depended on English law, *The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456, would be an authority *a fortiori* against their claim.

As to the contention that the mortgagees in the present case had, by virtue of the mortgage, some kind of "property" in *The Marie Glaeser,* no information was given to the court as to the exact meaning of the word "property" so used, or as to its nature, or whether it imported some kind of "ownership" of the vessel. By our own statute law, except so far as may be necessary for making a mortgaged ship available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of the ship, nor shall the mortgagor be deemed to have ceased to be the owner thereof. Merchant shipping act 1894, § 34.

Whether the German law as to mortgages substantially differs

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from ours, or what the German law on the subject may be, this court declines to inquire. To do so is no part of the duty of a Court of Prize. The difficulties and delays of embarking upon any such inquiries have always been given by Prize Courts as reasons for not entertaining any claims for liens or charges on captured ships.

In *The Marianna* (1805) 6 C. Rob. 24, 1 Eng. P. C. 518 (which was a claim by a neutral on a lien for unpaid purchase money) Lord Stowell said:—

"Captors are supposed to lay their hands on the gross tangible [231] property, on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

It is not profitable to guess at the effect of the German mortgage deed; but there is certainly nothing upon the face of it which indicates any transfer of ownership, or anything other than a charge for the mortgage debt. Portions of the conditions before set out seem to negative anything of the kind; and how are captors at sea, or the Prize Courts on land, to solve puzzles and perplexities which might arise from the condition that "all disputes arising between the mortgagor and mortgagees are to be submitted to the competent Court of Justice of Hamburg?"

The fact has been stated that no reference to the mortgage is to be found in any of the ship's papers; and, so far as I am aware,

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no notice of or any information as to the mortgage was given to the captors or anyone interested in the capture till the claim was put in in the proceedings. But these facts are really not material.

The truth is that capture of enemy vessels at sea during war would be a hazardous and almost worthless right of belligerents if the captors were confronted with such claims as are put forward in this case, or if mortgages gave to mortgagees prior rights to those of the captors.

[232] But counsel for the claimants, as his last resource, boldly pressed the court to extend the law at the present day, so as to protect neutral mortgagees of enemy ships, on the ground that the law of nations has advanced, as he contends, in this direction, by and since the Declaration of Paris, 1856; and that such a protection is necessary to accord with the policy and spirit of the Declaration with regard to neutrals.

It is advisable to glance briefly at the way the Declaration has been dealt with by the nations. Before the Declaration of Paris the treatment of enemy goods under a neutral flag, and neutral goods under the enemy's flag, which was afterwards embodied in the second and third articles of the Declaration, was agreed to and observed by France and this country during the Crimean War. The Declaration itself—the terms of which "are not strictly authoritative law" (Hall, 6th ed. p. 687)—has been adopted by practically all the civilized states of the world except the United States of America.

The United States refused to become a party to it chiefly on the broad ground that they desired a complete exemption from capture at sea of all private property other than contraband. Nevertheless the United States announced at the beginning of the Civil War that they would give effect to its principles during those hostilities; and again in 1898, during their war with Spain, the President issued a proclamation on April 26, 1898, declaring that the policy of the United States government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods not contraband of war are not liable to confiscation under the enemy's flag."

Spain also in the same year, while maintaining that she was

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not bound by the Declaration, gave orders for the observation of the rules that (1) a neutral flag covers the enemy goods, except contraband of war, and (2) neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag. Hertslet, Commercial Treaties, XXI., 837.

Spain and Mexico, which had for half a century refrained from acceding to it, have recently formally acceded, the former state on January 18, 1908, and the latter on February 13, 1909.

[233] Our own country, one of the original parties to it, has steadfastly adhered to it.

This court accordingly ought to, and will, regard the Declaration of Paris, not only in the light of rules binding in the conduct of war, but as a recognized and acknowledged part of the law of nations, which alone is the law which this court has to administer.

But how can it be used or applied so as to support the claimant's case? This court can only enunciate what it conceives to be the law of nations. If any matter of international law in controversy between nations requires to be settled by international convention, this court cannot antecedently declare the controverted doctrine to be a part of international law.

The Declaration of Paris, in the two articles referred to, only dealt with goods or merchandise carried in vessels, and not with the vessels themselves. If it had been intended to deal with vessels, and property, rights, or interests in them, that would have been expressed. The object was to insure the maintenance of maritime commerce by making certain goods carried over the seas immune from confiscation.

The lending of money upon vessels or "financing" their owners may be usual, necessary, and profitable as business transactions; but they cannot with propriety be put upon the same footing in international law as the commerce which constitutes the world-wide trade of the carriage of merchandise by sea. There does not appear to be any direct relation in principle between guarding the safety of this commerce upon its course across the oceans in the common interest of the nations, and giving protection by special rules of international law to persons or companies who invest their moneys in shipping ventures.

Apart, therefore, from any assistance which may be derived

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from decisions of various Prize Courts since the date of the Declaration, this court could not accede to the suggestion that neutral mortgagees of vessels should have a rule of law created for their protection.

But have any decisions in any Prize Court since 1856 proceeded in the direction urged? Has any Court of Prize since assented [234] to such a claim as is now being made? The answer, it is believed, is in the negative.

On the contrary there have been decisions against such claims. In 1866 the Supreme Court of the United States of America decided in *The Hampton,* 5 Wall. 372, 18 L. ed. 659, that "in proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens, subject to being overriden by the capture, not as *jura in re,* capable of an enforcement superior to the claims of the captors." (See first part of the headnote.)

The claimant there was "a loyal citizen," and the bona fides of his mortgage was not disputed. His claim was to have the amount of his mortgage paid to him out of the proceeds of the sale of the captured vessel. Miller, J., in delivering the opinion of the Supreme Court, said:—

"The first ground on which the appellant relies is that the mortgage being a *jus in re,* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the Prize Courts the strict common-law doctrine which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern Admiralty Courts to treat mortgages as the Equity Courts treat them as mere securities for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a Prize Court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnations. As soon as a war

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was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture would only have to raise a sufficient sum of money on them by bona fide mortgages to indemnify them in case of such capture. If the vessel or [235] cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his hands already. The mortgagee, having an honest mortgage which he could establish in a Court of Prize, would either have the property restored to him, or get the amount of his mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break a blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. A principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all dangers to parties disposed to break them, cannot be recognized as a rule of Prize Courts. There seems to be no reason to doubt the loyalty of the appellant or the fairness of his debt, and we regret our inability to provide for his claim. But until international treaties, or an act of Congress, shall mark another stage in the meliorations of the rigors of war, we are not at liberty to interpolate a principle which would tend so materially to destroy the right of prize capture in time of war."

So, in 1867 in *The Battle,* 6 Wall. 498, 18 L. ed. 933, also in the Supreme Court of the United States of America, Nelson, J., in delivering the judgment, said: "The principle is too well settled that capture as prize of war, *jure belli,* overrides all previous liens, to require examination." And in the case previously cited mortgages were treated as liens.

In 1870, in the Prize Court of France, a claim was made by Hoffman & Company, British shipbrokers, who had a mortgage upon a Prussian ship Der Turner, that a sum to discharge the mortgage should be set aside from the proceeds of sale. It was there suggested that the claim might be allowed "by analogy and in accordance with the principles established by the Paris Conference that neutral property under an enemy flag is not subject to capture." But the decision was against the claim. It is summarized in these words: "La propriété du navire, au point de

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vue de l'exercice des droits de la guerre, est indivisible. L'hypothèque consentie sur un navire d'après les lois allemandes [236] ne donne pas au créancier, sujet neutre, le droit de réclamer le bénéfice de la déclaration du Congrès de Paris."

In the course of the judgment the court said: "Mais, attendu que la propriété du navire, au point de vue de l'exercice du droit de guerre, est absolument indivisible; que ce principe est admis d'une façon constante par les tribunaux maritimes de tous les peuples de l'Europe, et notamment par la cour de l'Amirauté anglaise; qu'ainsi le sujet neutre, co-propriétaire d'un navire naviguant sous pavillon ennemi et ayant droit à porter ce pavillon, ne peut, si ce navire est capturé, revendiquer contre le capteur sa part de co-propriété; qu'en supposant même que l'hypothèque permise par la loi prussienne sur le navire pût être, comme l'hypothèque constituée par les lois françaises, considérée comme un démembrement de la propriété, cette hypothèque ne pourrait apporter aucun obstacle à l'exercice absolu du droit de la guerre; que la première reclamation des sieurs Hoffman et Cie. doit donc être rejetée." Barboux, Jurisprudence du Conseil des Prises, 1870–1871 (Paris, 1872), p. 76.

In 1899, again, the Supreme Court of the United States of America in *The Carlos F. Roses*, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803, dealt with the subject exhaustively in a claim put forward by a British company which had advanced money upon a cargo on a captured ship, and which had received bills of lading covering the shipments. Fuller, Ch. J., delivered the judgment of the court. In the course of his judgment he said at p. 666:

"The right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties Hence the Prize Courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading."

He also cited with approval the following passage from *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609:—

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in

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his possession, for the balance of account due to him; and so [237] has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in Prize Courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the Prize Courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts."

The Chief Justice also cited with approval the decision in *The Hampton* (1866) 5 Wall. 372, 18 L. ed. 659, and *The Tobago* (1804) 5 C. Rob. 218.

To come down to a later and recent date, in 1905, during the Russo-Japanese war, the Sasebo Prize Court in Japan followed the same lines. In *The Nigretia,* Takahashi, 551, a preferential claim was made, apparently by a Japanese subject, for salvage expenses incurred before the seizure. It was argued for the petitioner that the preferential right claimed was an "actual right recognized by law, and not based upon a voluntary contract like a mortgage," and that therefore it was entitled to protection.

The court of first instance pronounced that "according to international law, the right of a captor being absolute, neither the real right" (by which, no doubt, is meant a right *in rem*) "nor the obligatory right of a third party can be set up against it."

On appeal the higher prize court confirmed this doctrine and the decision, Takahashi, 553.

In another case in the same court in 1904—The Russia, Takahashi, 557, at p. 559—a claim for a prior right for necessaries was made. The court said: "If the ship is a lawful prize she cannot be released on account of a neutral person having a claim against her. Even [238] though the petitioner's claim was created by the disbursement of the ship's necessary expenses for continuance of the voyage, a third party has no right to make any

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claim upon the property, as not only is there no provision in our Prize Court regulations recognizing a prior claim upon a prize, but, according to international law, the right of the captor to a prize confiscated as the enemy's property is absolute."

These are some of the cases which have come before Courts of Prize since 1856. They follow closely the principles of the older decisions.

The claimants' counsel admitted that he was not able to cite in favor of his contentions any decision of any court, or any statement of any of the eminent writers and jurists of this or other countries. Probably no such decision or statement exists.

The court has no hesitation in pronouncing that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of this captured vessel must be rejected. The same conclusion would be arrived at if the claim were by British subjects. It need scarcely be added that the Crown, being entitled to captured property, may out of its bounty deal favorably with any such claims.

The case has thus far been dealt with from the points of view presented at the bar. But there is also another broad ground which can be shortly stated, upon which the claimants could not succeed in any view of their rights. Even assuming that they had a "property" in the vessel, or even if they had rights of ownership and could properly be regarded as the owners of the whole or any part of the vessel, the fact that the vessel was sailing under the German flag, with papers entitling her to do so, and navigated by a German master in the commerce of the German Empire, would be fatal to their claim. See *The Vigilantia* (1798) 1 C. Rob. 1, 1 Eng. P. C. 31; *The Vrow Elizabeth* (1803) 5 C. Rob. 4, 1 Eng. P. C. 409; *The Primus* (1854) Spinks, 48, 2 Eng. P. C. 290; *The Industrie* (1854) Spinks, 54, 2 Eng. P. C. 297. The doctrine is summed up in Hall's International Law, 6th ed. at p. 498. I will make one further reference to [239] one of our late eminent international jurists. Apart from the acknowledged authority which attaches to the work and opinions of the late Mr. Westlake, there is ample judicial support for this statement in the passage in his International Law—War (1913 ed.) at p. 169:—

"If a ship sails under the enemy flag, the character which

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her owner or any of her part owners may have as individuals is immaterial. By accepting the flag, they have placed themselves under its protection; if that fails them she may be captured, and will be condemned, and no share which a friend may have in her will be saved. A mortgage or lien on a ship sailing under the enemy's flag, whether it arises by contract or by law as a factor's lien—unless it is a general law of the mercantile world, as that which gives the lien of freight—is treated as a part interest in the ship, and is not saved from the condemnation."

Upon all these grounds the court rejects the claim of the mortgagees, but no order will be made against them in respect of costs.

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for the owners and parties interested in disbursements, etc.: *Thomas Cooper & Company.*

Solicitors for the mortgagees: *Lightbound, Owen & Company.*

Note.—For annotation of the question involved in this case, see note to *The Odessa, post,* 1002.

[PRIVY COUNCIL.]

THE ODESSA.

THE WOOLSTON.

[CONSOLIDATED APPEALS.]

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

[IN PRIZE.]

[1916] A. C. 145.

Prize court — Cargo and pledgees — Consignees under bills of lading — Ownership — Bounty of Crown — Power unimpaired by civil list acts — Civil list act 1910 (10 Edw. VII. & 1 Geo. V. chap. 28).

The Prize Court does not recognize the claim of a pledgee of cargo seized as prize, the legal ownership of which was at the time of seizure

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in an enemy subject, and this rule applies to a pledgee who is holder of the bills of lading and is named therein as consignee of the cargo. In determining national character legal ownership is the sole criterion.

The power of bounty which the Crown was accustomed to exercise by way of redress of hardship to subjects or neutrals from decrees of the Prize Court exists unimpaired by the civil list acts.

(November 11, 1915.)

Present: Lord Mersey, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Edmund Barton.

CONSOLIDATED appeals from two decrees of the Prize Court (England), made on December 21, 1914, and March 16, 1915, respectively; reported, as to *The Odessa* L. R. [1915] Prob. 52, 112 L. T. N. S. 473, 31 Times L. R. 148, 59 Sol. Jo. 189.

The appellants in both appeals were Messrs. J. Henry Schröder & Company, who were bankers carrying on business in London, the firm consisting of two partners, one of whom was a natural-born British subject and the other a naturalized British subject.

The facts as to the cargo *ex* the Odessa fully appear from the judgment of their Lordships. The cargo, consisting of nitrate of soda, was sold by a Chilean firm to a German company carrying on business at Hamburg, and was shipped in May, 1914, "bound for Channel for orders." In June, 1914, the appellants accepted bills of exchange for 41,153*l.* 1*s.* 5*d.* (the price of the cargo) drawn by the sellers, and as security received and held the bill of lading which made the cargo deliverable to them or to their assigns. On August 4, [**146**] 1914, while the ship was on her voyage, war broke out between Great Britain and Germany, and on August 19, 1914, the ship was captured at sea. A writ was issued by the Procurator General, claiming that the ship and cargo belonged to enemies of the Crown and were liable to confiscation as lawful prize. The appellants claimed the cargo, alleging that it was their property and/or as holders of the bill of lading for full value.

The President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans), having previously condemned the ship, on December 21, 1914, delivered his considered judgment as to the cargo. He held that the cargo was the property of the German

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company, and that the appellants were merely pledgees, and not entitled to have the cargo released to them; he accordingly made a decree condemning the cargo as lawful prize.

The Woolston was a British steamship. The cargo consisted of nitrate of soda belonging to H. Folsch & Company, a German firm carrying on business at Hamburg; it was shipped from two ports in Chile in June and July, 1914, for "Las Palmas for orders." The appellants accepted drafts for the account of H. Folsch & Company, and as security that firm, by letters dated July 8, 1914, sent to them the bills of lading which made the cargo deliverable to them or to their assigns. The ship being upon her voyage when war was declared, the appellants ordered her to Liverpool and indorsed the bills of lading to warehousemen at that port to take delivery of the cargo upon their account. The cargo was discharged into a warehouse, where it was provisionally detained by the customs, and on December 31, 1914, was seized as prize. A writ was issued by the Procurator General, claiming that the cargo was the property of enemies of the Crown and was liable to confiscation as lawful prize. The appellants claimed the cargo as owners and/or as holders of the bills of lading. Alternatively they claimed that the cargo was not liable to seizure or condemnation on the ground that the Woolston was a British vessel. In the further alternative they claimed to be allowed certain disbursements incurred by them.

The President (Sir Samuel Evans) on March 16, 1915, following his decision in the case of the cargo *ex* Odessa, condemned the cargo on the ground that it was the property of H. Folsch & Company, and that the appellants were only pledgees. He ordered that the appellants [**147**] should be repaid their expenses in respect of freight, landing charges, superintending charges, and rent, but not their expenses in respect of marine and fire insurance, nor demurrage paid by them to the shipowners.

Sir Robert Finlay, K.C., and **Mackinnon**, K.C. (**C. R. Dunlop** with them), for the appellants. In both cases under appeal the appellants, who are British subjects, were holders of the bills of lading and were named therein as consignees of the goods. As holders of the bills they had constructive possession of the goods. *E. Clemens Horst Co.* v. *Biddell Brothers* [1912]

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A. C. 18, 81 L. J. K. B. N. S. 42, 105 L. T. N. S. 563, 28 Times L. R. 42, 56 Sol. Jo. 50, 12 Asp. Mar. L. Cas. 80, 17 Com. Cas. 55, 49 Scot. L. R. 680. Moreover they had a special property in the goods, since they had, subject only to the right of redemption, full power of disposition over them, including the right of sale. *Bristol and West of England Bank* v. *Midland Ry. Co.* [1891] 2 Q. B. 653, 61 L. J. Q. B. N. S. 115, 65 L. T. N. S. 234, 40 Week. Rep. 148, 7 Asp. Mar. L. Cas. 69. The effect of the decision in *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 758, is confined to the question whether the property in the goods had passed for the purposes of the bills of lading act 1866; further, the appellants in that case were not named as consignees.

The rule that the Prize Court does not recognize the claim of a pledgee of enemy cargo extends only to cases where there is a secret lien, and does not apply where the pledgee is named on the face of the bill of lading as consignee. A review of the authorities shows that the reasoning upon which the rule is based cannot be applied to the well-recognized commercial practice which now exists of consigning goods to bankers who accept bills of exchange upon their security. *The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456; *The Marianna* (1805) 6 C. Rob. 24, 1 Eng. P. C. 518; *The Belvidere* (1813) 1 Dodson, Adm. 353, 2 Eng. P. C. 183; *The Constantia Harlessen* (1810) Edw. Adm. 232; *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609; *The Aina No. 1* (1854) Spinks, 8, 2 Eng. P. C. 247; *The Ida* (1854) Spinks, 26, 2 Eng. P. C. 268; *The Abo* (1854) Spinks, Prize Cas. 42, 2 Eng. P. C. 285; *The Ariel* (1857) 11 Moore P. P. C. 119, 2 Eng. P. C. 600. In *The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456, Sir W. Scott rejected the claim of the holders of a bottomry bond upon [148] the ground that they had not possession and had only a *jus in rem*. This decision, therefore, supports the appellants since they had constructive possession and a *jus in re*. The question as to a claim by a pledgee who was named as consignee in the bill of lading first arose for decision in the American case of *The Carlos F. Roses* (1900) 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803; the view expressed by

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the two dissentient judges in that case and their reasoning are correct and should be adopted. The decision in *The Amy Warwick* (1862) 2 Sprague, 150 and 160, Fed. Cas. Nos. 343 and 344, referred to in the last-named case, strongly supports the appellants' contention. The particular class of interest under consideration in the present appeals did not exist in commercial practice in the time of Lord Stowell, and it is highly improbable that he would have applied the rule as to a pledgee's lien to the present facts; the effect of so doing would be to injure British bankers, and not the enemy owners. Until the decision in *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 758, it was doubtful whether indorsees of a bill of lading who held against an advance on the goods had not the property in the goods. The view of Lord Esher in the Court of Appeal in that case ((1884) 13 Q. B. D. 159) had been that they had the property, and the decision of the House of Lords is limited in the manner already pointed out. The law enforced in Prize Courts must be applied to meet developments and changes in international law and in usages of trade. As an example the Prize Court now recognizes the claim of a person who has the right of stoppage *in transitu* to have the goods released, since that claim is supported by the Declaration of London.

Prize Courts have always recognized the shipowner's lien for freight. In *The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456, the reason given is that "the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract." The rights of the appellants at common law under their lien are at least equal to those of a shipowner in respect of freight. There would be no more difficulty in ascertaining the amount due to pledgees than exists in ascertaining the amount due for freight where questions as to *pro rata* and advance freight have to be dealt with. Where the advance is of the whole value of the goods no difficulty could arise. *The* [149] *Marie Glaeser,* L. R. [1914] Prob. 218, ante, 958, 31 Times L. R. 8, 59 Sol. Jo. 8, and other cases as to claims by mortgagees of a ship are not applicable, as the ship's register is conclusive as to ownership under the merchant shipping act 1894.

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An element in the decisions of Lord Stowell as to the claims of pledgees was that cases of hardship to British and neutral pledgees could be and were alleviated by the bounty of the Crown by payment out of the droits of the Crown. The power of the Crown to make payments of this character has, however, ceased to exist as the effect of the civil list act 1837 (1 & 2 Vict. chap. 2), and subsequent civil list acts which in effect re-enact that statute. The Prize Claims Committee, referred to by the Attorney General before the President (see [1915] Prob. at p. 58), cannot therefore effectively recommend any such payments.

Maurice Hill, K.C. (with him **Sir Edward Carson**, A.G., **T. Mathew**, and **Case**), for the respondent, the Procurator General. The authorities establish the rule that Prize Courts do not recognize the claims of pledgees of enemy cargo. No valid distinction can be drawn on the ground either that the appellants were named in the bills of lading, or that as holders of the bills they had constructive possession of the goods. At least three of the cases already cited are direct authorities against the appellants. In *The Marianna* (1805) 6 C. Rob. 24, 1 Eng. P. C. 518, the goods were consigned to the correspondent of the claimants. In *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609, there were two claims rejected, one of them being in respect of an advance by a pledgee consignee. *The Ida,* Spinks, 26, 2 Eng. P. C. 268, was a case of a bankers' advance, and the pledgee was named in the bill of lading; the only difference from the present cases was that the claimant was a neutral, and that is not material. Further, the American decision in *The Carlos F. Roses* (1900) 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803, is precisely in point, and it is of additional importance, since it was decided in 1900, when the practice of bankers followed in that and in the present cases was fully established and known. The decision in *The Amy Warwick* (1862) 2 Sprague, 150 and 160, Fed. Cas. Nos. 343 and 344, is based upon a finding of fact that the legal property in the goods was in the claimant and is consequently distinguishable. The ownership of the goods has always been the only test applied [**150**] by Prize Courts, and was adopted by art. 58 of the Declaration of London after the subject had been referred to a committee. [In addition to the cases referred to on behalf of the appellants, reference was made

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to *The Nigretia* (1905) 2 Russian and Japanese Prize Cases, 208, and *The Rossia* (1905) 2 Russian and Japanese Prize Cases, 43; also to Platt's Story on Prize Law 1854, p. 52.]

A shipowner's claim for freight upon captured goods is not analogous to a pledgee's claim for advances. The court, in allowing freight, does not proceed upon the basis of recognizing the shipowner's lien, which does not exist, since the cargo has not reached its destination, but upon the principle of allowing to the shipowner the benefit received by the captor by reason of the transport of the goods. *The Tobago* (1804) 5 C. Rob. 218. To give effect to claims of the character of those now put forward would be advantageous to the enemy owner of cargo as giving him greater credit.

The question in the appeals must be approached as a question of law uninfluenced by considerations of hardship in particular cases. The commission directed to the Prize Court requires it to decide "according to the course of admiralty and the law of nations, and the statutes, rules, and regulations for the time being in force." Manual of Emergency Legislation, p. 250. At the date of the decisions in some of the older cases there appears to have been a power in the Prize Court under treaties and consequent Orders in Council to meet claims of third parties injuriously affected. This appears from a note to the report of *The Belvidere,* 1 Dodson, Adm. 353, at p. 354, note, and the judgment seems to indicate that there was no such power in the court apart from that circumstance. It is wholly immaterial to the decision of the appeals whether or not the power in the Crown to exercise its bounty still exists. The present civil list act, however, appears to leave that power unimpaired. [Reference was made to Rothery's Prize Droits, pp. 12 to 14 and 19 to 21, as to the history of and distinction between droits of the Crown and droits of admiralty; civil list act 1831 (1 Will. chap. 25), § 2; civil list act 1837 (1 & 2 Vict. chap. 2), §§ 1 and 12; civil list act 1901 (1 Edw. VII. chap. 4), §§ 1 and 9; civil list act [151] 1910 (10 Edw. VII. & 1 Geo. V. chap. 28), §§ 6 and 9; and the naval prize act 1864 (27 & 28 Vict. chap. 25).]

Mackinnon, K.C., in reply. In *The Ida* (1854) Spinks, 26, the true bill of lading was indorsed in blank, the claimant's name appearing only upon what was found to be a false document.

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Their Lordships subsequently desired to hear the Attorney General upon the question whether the power of the Crown to redress cases of hardship out of its bounty still existed.

Sir Edward Carson, A.G. According to the true view of the civil list acts the Crown's power of bounty has ceased to exist. But for the reservation in § 12 of the civil list act 1837, it could not be suggested that that act left in the Crown any rights in droits of the Crown or droits of admiralty. That reservation, however, applies only to payments to captors. The reservations contained in § 9, subsec. 2, of both the civil list acts 1901 and 1910, merely preserve such rights as existed before the passing of those acts. The naval prize agency and distribution act 1864 (27 & 28 Vict. chap. 25), § 17, shows that apart from statutory enactment the payments could not be made.

The judgment of their Lordships was delivered by

Lord Mersey: These are appeals from two judgments of the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice sitting in prize.

There is very much in common in the points arising in both cases, but as the facts and arguments are not identical, it is desirable to consider each case separately.

The Cargo *ex* Odessa.

The facts in this case are as follows: The appellants, Messrs. J. Henry Schröder & Company, are bankers carrying on business in London. The partners are Baron Bruno von Schröder, a naturalized British subject, and Frank Tiarks, a natural-born British subject. In the ordinary course of their business, the appellants had in March, 1914, agreed with a German company in Hamburg, called the Rhederei [152] Actien Gesellschaft von 1896, to accept the drafts of Weber & Company, a firm carrying on its business in Chile, for the price of a quantity of nitrate of soda to be sold and shipped by Weber & Company to the German company.

The drafts were to be drawn at ninety days' sight, and the appellants, upon acceptance of them, were to receive by way of

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security the bill of lading for the cargo, together with a policy of marine insurance. The consideration for this accommodation was to be a commission of ¼ per cent payable by the German company to the appellants. In due course Weber & Company shipped a cargo of nitrate on board a sailing ship called the Odessa, belonging to the German company, and took from the captain a bill of lading dated May 8, 1914, in which the voyage was described as from Mejillones (the port of shipment in Chile) to the "Channel for orders," and by which the cargo was made deliverable to the appellants or their assigns. This bill of lading incorporated the terms of a charter party (of which there is no copy), and made the chartered freight payable by the consignees upon delivery of the cargo. Drafts for a total amount of 41,153*l.* 1*s.* 5*d.* (said to be the full price of the cargo) were drawn by Weber & Company upon the appellants, and accepted by them on June 4 and 9, 1914, they receiving in exchange the bill of lading. War broke out between Great Britain and Germany on August 4, 1914, the Odessa being then on her voyage to the Channel. On the 19th the ship was captured on the high seas by H.M.S. Caronia and brought into Bantry bay, and on the 31st a writ was issued against ship and cargo at the suit of the Procurator General, claiming condemnation of both as lawful prize. On September 5 and 10 the drafts of Weber & Company fell due and they have been paid by the appellants. The ship was duly condemned, and no question arises with reference to her condemnation, but in respect of the cargo the appellants intervened, and by their claim alleged it to be their property as holders for full value of the bill of lading therefor and as British property not liable to condemnation. The case was heard by the learned President on December 7 and 14, 1914, with the result that he condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that the appellants were merely pledgees, and as such not entitled to any precedence over the Crown.

[153] Their Lordships are of opinion that the learned President was right in the inferences which he drew from the facts, namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of the seizure. This indeed is hardly disputable,

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having regard to the case of *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 758. The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading.

The appellants indeed did not dispute the correctness of these inferences, but what they say is that, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations up to the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas or in the belligerent's territorial waters and enemy cargoes. But such seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing state, in this country by the Procurator General. It is a suit *in rem,* and the function of the court is to inquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to devest the enemy subject of his ownership as from the date of the seizure, and to transfer it as from that date to the Sovereign or to his [**154**] grantees. The thing—the *res*—is then his for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognized, so also is the title which the judgment of the court creates. The judgment is

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of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance, rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized the courts in this country have taken ownership as the criterion, meaning by ownership the property or dominium as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which, under different systems of jurisprudence, may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of everyone who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the court would be subject to a burden which it could not well discharge.

There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognized in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender, and create in favor of such lender a charge or lien or mortgage on the goods in question. He would thus stand to [155] lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his debt. Again,

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if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt, instead of being left to recover it in the enemy's courts, the door would be opened to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

Acting upon the principle of this rule Courts of Prize in this country have, from before the days of Lord Stowell, refused to recognize or give effect to any right in the nature of a "special" property or interest, or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing and involve different considerations; but even as to these it is doubtful whether the court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of the court to make an equitable allowance to the national or neutral lien holder in respect of such services. In the judgment in *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609, speaking of freight, it is said: "On the one hand the captor by stepping into the shoes of the enemy owner of the goods is personally benefited by the labor of a friend, and ought in justice to make him proper compensation, and on the other, the shipowner by not having carried the goods to the place of their destination, and this in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods."

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of *The Tobago* (1804) 5 C. Rob. 218, is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship, which was disabled, and by way of security he had taken from the owner a bottomry bond. Afterwards war broke out with France and the vessel was captured. In the [**156**] proceedings in the Prize Court for condemnation the holder of the bottomry bond

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asked that his security might be protected, but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "But can the court recognize bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" And he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel, and says: "If there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and, amongst the rest, the chances of war."

The decision in *The Mary* (1815) 9 Cranch, 126, 3 L. ed. 678, is to the same effect. Similarly in *The Aina* (1854) Spinks, 8, the court refused to recognize or give effect to a mortgage on the ship captured, and the same point arose and was similarly decided in *The Hampton* (1866) 5 Wall. 372, 18 L. ed. 659. Again, in *The Battle* (1867) 6 Wall. 498, 18 L. ed. 933, the court refused to recognize a maritime lien for necessaries, a decision which was followed in *The Rossia,* 2 Russian and Japanese Prize Cases, 43; *The Ariel* (1857) 11 Moore, P. C. C. 119, was the converse case of an attempt to obtain condemnation not of enemy goods, but an enemy lien on goods; it failed on the same principle. In that case Sir John Patterson said: "Liens whether in favor of a neutral on an enemy's ship, or in favor of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

All these cases were fully discussed by the President in *The Marie Glaeser* [1914] Prob. 218, ante, 958, 31 Times L. R. 8, 59 Sol. Jo. 8.

Passing to cases which in their circumstances more resemble the present case, there is *The Marianna* (1805) 6 C. Rob. 24, in which the court refused to give effect to a contract of pledge on goods consigned to the agent of the pledgee. "Captors," says Sir W. Scott in that case, "are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule [157] did not exist it would be quite

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impossible for captors to know upon what grounds they were proceeding to make seizure. . . . The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenant and the application of that law in all countries under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

There is *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609, in which the court refused to recognize or give effect to the rights of a consignee under the bill of lading for advances against the goods to which the bill of lading related. In that case the court laid it down that "in cases of liens created by the mere private contract of individuals, depending upon the different laws of dicerent countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the Prize Courts in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts."

There is another American case, *The Carlos F. Roses* (1900) 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803, in which the claim put forward by a neutral who had advanced money upon a cargo on a captured ship and who had received bills of lading covering the shipment was rejected.

It is difficult to distinguish the facts in any of the three cases last mentioned from the facts of the present claim by Messrs. Schröder & Company. Some stress was laid by the appellants upon the dissenting judgments in *The Carlos F. Roses,* but a perusal of those judgments will show that they proceeded upon the assumption that in the circumstances the general property in the goods had passed to the holder of the bills of lading. The case was decided before the judgment in *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 758. Finally *The Hampton, supra,* is a case in which the claim of a mortgagee on a ship was rejected.

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Before adverting to the arguments by which the appellants seek to displace this weight of authority, it is necessary to deal with a [158] contention put forward by them to the effect that by their title as pledgees they are clothed with a sufficient ownership to bring their case within the rule. This contention is based upon the right of sale accorded to a pledgee by the law of England, by which, in the event of default by the pledgeor in payment of his debt, the pledgee can sell the pledge without first having recourse to a court of law for authority to do so. This right, it is said, creates a "special" property in the pledge in favor of the pledgee, and is a right *in re* constituting or equivalent to ownership and distinguishable in character from the mere right *in rem* possessed by a lienholder. It is first to be observed of this right to sell without recourse to a court of law that it is peculiar to the English law of pledge. It is thus precisely one of those matters which a Prize Court should leave out of consideration when applying to its decision general principles common to all systems of law to the exclusion of principles of municipal law.

The subject was very fully examined by Chancellor Kent in Lord Stowell's time in 1805 in a learned judgment declaring the decision of the supreme court of the state of New York (*Cortelyou* v. *Lansing* (1805) 2 Cai. Cas. 200, at p. 202): "I believe," he says, "that there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence." And, secondly, it is to be observed that if the right clothes the pledgees with ownership it precludes the court from making any decree at all of condemnation.

The ownership by which a Court of Prize is guided cannot subsist both in the pledgees and in the pledgeors. If it exists in the appellants in the present case no decree can be made against them, for they are British subjects, and the interest left in the enemy subject cannot be condemned, for *ex hypothesi* it is not an interest which includes ownership. See *The Ariel* (1857) 11 Moore, P. C. C. 119, in which it was laid down that as a Court of Prize ignores a lien in favor of a neutral on an enemy's ship, so will it ignore a lien in favor of an enemy on a neutral ship.

But when the nature of the right of a pledgee to sell is examined it will be seen that the so-called "special" property which

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it is said to create is in truth no property at all. This has been recognized [159] by many judges who have used the expression "special interest" as a substitute for "special property." See *Mores* v. *Conham* (1610) Owen, 123, and *Donald* v. *Suckling* (1868) L. R. 1 Q. B. 585, at p. 613, 7 Best & S. 783, 35 L. J. Q. B. N. S. 232, 12 Jur. N. S. 795, 14 L. T. N. S. 772, 15 Week. Rep. 13, 21 Eng. Rul. Cas. 301.

If it were not for the somewhat unfortunate peculiarity of English terminology involved in the established use of the words, "special property," when "special interest" would seem better, it is difficult to see how an argument could be maintained which would effectively distinguish pledge from lien for present purposes.

The very expression, "special property," seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells he does so by virtue and to the extent of the pledgeor's ownership, and not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgeor's debt, for the money resulting from the sale is the pledgeor's money to be so applied. The pledgee must account to the pledgeor for any surplus after paying the debt. He must take care that the sale is a provident sale, and if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing himself the advance which he has made. He cannot use the goods as his own. These considerations show that the right of sale is exercisable by virtue of an implied authority from the pledgeor and for the benefit of both parties. It creates no *jus in re* in favor of the pledgee; it gives him no more than a *jus in rem* such as a lien holder possesses, but with this added incident, that he can sell the property *motu proprio* and without any assistance from the court.

Returning to the authorities, the appellants attempt to displace them in the following way: They say, in the first place, that Lord Stowell in *The Tobago* (1804) 5 C. Rob. 218, was referring only to "secret" liens, which they interpret to mean liens not appearing on the ship's papers, and they contend that theirs was not secret for that it appears on the ship's papers; namely, on the face of the bills of lading. But when the judg-

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ment in *The Tobago* is examined it will be found that Lord Stowell used the term, "secret liens," as equivalent to liens created by the act of the parties as opposed to those arising under the general law merchant. Further, it cannot in the present case [160] be said with any truth that Messrs. Schröder's lien is disclosed on the ship's papers. It is true that the bill of lading was made out in favor of them or their assigns, but this is quite consistent with their having no charge at all, and the consignment having been made to them merely as the factors or agents of the enemy owner. The contract of pledge under which alone their claim arises, however probable in the ordinary course of commerce, is nowhere disclosed in the ship's papers. Again, such as it was, the disclosure was certainly no more than existed in the cases of *The Marianna* (1805) 6 C. Rob. 24, *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609, and *The Carlos F. Roses* (1900) 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803.

Secondly, the appellants contend that, being by virtue of the bill of lading in possession of the goods in question, there can be no reason in principle why the court should not recognize an interest arising out of such possession just as it recognizes the carrier's possessory lien for freight. But such possession as the appellants had is not an actual possession such as forms the basis of a possessory lien at common law, but merely such possession as, according to the law relating to pledge, arises out of constructive or symbolical delivery. There is not, to use the words of Lord Stowell in *The Tobago, supra,* that "interest directly and visibly residing in the substance of the thing itself" which is to be found in the actual possession held by a carrier. Further, it will be found that a possession similar in character to that which Messrs. Schröder had existed in several of the cases already referred to on the part of lienholders whose claims were rejected by the court.

Thirdly, the court was asked to accept the suggestion that the practice of making advances on the security of bills of lading had arisen after the decisions referred to had been pronounced, and that in the interest of commerce the adverse decisions should now be disregarded. With regard to this argument it is to be observed that at any rate *The Carlos F. Roses, supra,* was decided at a time when the practice referred to was well known,

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and although the decision cannot bind an English court, still the considered judgment of the Supreme Court of the United States is entitled to the greatest possible weight. Further, it is difficult to see how any change—if [161] there has been any change—in commercial practice invalidates the reasons which led to the decisions in question.

Lastly, the appellants urged that if the court now applies the principles illustrated by the cases above referred to very serious injustice will be done to and serious loss incurred by neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the eighteenth and early nineteenth centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilized nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent right of capture that the courts have refused to recognize such liens or rights in spite of the hardship which might be occasioned to individuals from such want of recognition. It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or subject by an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to pronounce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty. See *The Belvidere* (1813) 1 Dodson, Adm. 353, and *The Constantia Harlessen* (1810) Edw. Adm. 232.

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Whether his judgments were in any way based on that consideration, or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed, is an arguable point.

[162] In their Lordships' opinion, however, it is unnecessary to decide this point, for after hearing the Attorney General they have come to the conclusion not only that the Crown had and was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired.

Perhaps the most notable instance of the exercise of such power was the Order in Council made at the commencement of the war with Denmark in 1807. It was thereby ordered that in case any advances should have been made before the then late embargo (namely, the 2d of September then last passed) by any British subject upon the credit and security of any ship, freight, or goods belonging to Danish subjects which might be condemned as prize to his Majesty, the amount of such advances so actually made (but without further compensation) should be paid to the British subjects out of the proceeds of the property so condemned upon the credit of which the advances were respectively made upon due proof thereof to the satisfaction of the High Court of Admiralty. If the Crown could order this generally, it must also have had the power to order it in particular instances. Further, if it could make such an order in favor of British subjects, it must also have had the power to make it in favor of neutrals, and circumstances can easily be imagined in which the exercise of such a power in favor of neutrals might as a matter of policy be deemed desirable.

If the Crown had and was accustomed to exercise the power of redressing hardship by way of bounty, such right must still exist unless taken away by act of Parliament, and it must be remembered that the Crown's prerogative can only be abridged by express words or necessary implication. The argument of the Attorney General to the effect that the power in question has ceased to exist is solely based on the effect to be given to the statutes which have been from time to time passed in reference to the civil list. The first civil list act which affects droits of admiralty and droits of the Crown is the act of 1 Geo. IV. chap. 1. By § 2 of that act the produce of certain Crown revenues

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(which did not include droits of admiralty or droits of the Crown or other small casual revenues) were for the life of King George IV. carried to the consolidated fund. It was provided that an account of all moneys to be received in respect of the casual revenues of the Crown including droits of admiralty and droits [163] of the Crown and of the application thereof should annually be laid before Parliament. By § 2 of 1 Will. IV. chap. 25, the casual revenues of the Crown including droits of admiralty and droits of the Crown were treated in the same way as the other hereditary revenues and carried during the life of King William IV. to the consolidated fund, it being provided that all such revenues should after his death be payable to his heirs and successors. Section 12 of that act provides that nothing therein contained should impair or prejudice any rights or powers of control, management, or direction relative to (*inter alia*) the granting of any droits of admiralty or any droits of the Crown as a reward or remuneration to any officer or officers or other person or persons seizing or taking the same or giving any information relating thereto, it being the true intent and meaning of the act that the said rights and powers should not in any degree be prejudiced in any manner, but only that the moneys accruing to the Crown after the full and free exercise and enjoyment of the said rights and powers should during his Majesty's life be carried to the consolidated fund. It was obviously the intention of this clause that the Crown's right of making grants out of droits of admiralty and droits of the Crown in favor of captors or persons giving information leading to the capture should be preserved, but, nothing being expressly said as to making grants in order to redress hardships, it is arguable that on the principle of *expressio unius est exclusio alterius* the Crown's right in this respect was intended to be taken away. Further, the same argument is open upon the construction of 1 & 2 Vict. chap. 2, which in effect re-enacted the act of 1 Will. IV. chap. 25, during the reign of Queen Victoria. It is unnecessary actually to decide the point, and their Lordships will assume for the purpose of this case that during the reigns of King William IV. and Queen Victoria the right of the Crown in respect of admiralty droits and droits of the Crown was confined to rewarding captors and persons giving information leading to the capture.

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It seems clear, however, that on the death of Queen Victoria her successor, King Edward VII., became entitled to droits of admiralty and droits of the Crown to the same extent as if there had never been a surrender in favor of the consolidated fund. In other words, any restriction created during the lives of King William IV. and Queen Victoria ceased to apply. If, therefore, the ancient right of the Crown to [**164**] dispose of these droits is now curtailed it must be by virtue of some statute passed subsequently to the death of Queen Victoria. In other words, it must be by virtue of the civil list acts 1 Edw. VII. chap. 4, and 1 Geo. V. chap. 28.

By 1 Edw. VII. chap. 4, § 1, it is provided that the hereditary revenues which were by § 2 of 1 & 2 Vict. chap. 2, directed to be carried to and made part of the consolidated fund, should during the life of King Edward VII. and six months afterwards be paid into the Exchequer and made part of the consolidated fund. By § 9, subsec. 2, it is provided that nothing in the act contained should affect any rights or powers for the time being exercisable with respect to any of the hereditary revenues which were by the act directed to be paid into the Exchequer, and by subsec. 3 of the same section 1 & 2 Vict. chap. 2, was with immaterial exceptions repealed. The act of 1 Geo. V. chap. 28, re-enacts in the same terms the act of 1 Edw. VII. chap. 4, for the life of his present Majesty and six months afterwards.

The question, therefore, is as to the meaning and effect of the reservation contained in the two last-mentioned acts of the rights and powers of the Crown for the time being exercisable. It should be noticed in contrast to the acts of 1 Will. IV. chap. 25, and 1 & 2 Vict. chap. 2, that the reservation is not specific, but general, in its terms. It should be noticed also that it is not a reservation of rights and powers which were or might have been exercised by some former Sovereign or Sovereigns (the form of reservation in some of the earlier civil list acts), but a reservation of rights and powers "for the time being" exercisable. This must mean powers which have not at the date of their proposed exercise been taken away by act of Parliament. To ascertain the nature of the rights and powers intended to be reserved, it is permissible to consider the object for which the acts themselves and the earlier acts hereinbefore mentioned were passed.

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The object of each of these acts is a surrender by the Crown of its hereditary revenues in consideration of a fixed grant from Parliament. Each act has been intended to carry to the consolidated fund revenue which would otherwise have gone to the Sovereign, and not revenue which because of the exercise of some right or power in the Crown would never have gone to the Sovereign at all. This [165] object was, in the acts of George IV., William IV., and Victoria, sought to be attained by a specific enumeration of the rights reserved. In the acts of Edward VII. and George V. it is sought to be attained by a general reservation of all rights. It could hardly be contended that the rights and powers expressly reserved in the earlier acts are not included in the general reservation contained in the latter acts. If such a contention were well founded the Crown would have lost many rights the existence of which is of great importance in the public interest. It would have lost, for instance, the right to make grants to the natural children of a bastard intestate, or to reward captors or persons giving information leading to the capture of enemy goods. It is of equal importance in the public interest, and indeed of friendly relations with neutral powers, that the Crown should retain the power of making in the interests either of British subjects or of neutrals such an Order in Council as was done at the outbreak of the Danish war in 1807. The only distinction is that no such power was expressly reserved in the earlier civil list acts. It is in their Lordships' opinion much more reasonable to suppose that the general words were used to cover such a case than to confine the words themselves, in spite of their generality, to rights and powers expressly reserved by the earlier acts. If the words of reservation now in force are sufficient to cover a right of so important and useful a nature, it would, in their Lordships' opinion, be wrong to hold that it had been destroyed merely because it had ceased to be exercisable during the reigns of King William IV. and Queen Victoria. Their Lordships therefore hold that the power in question still exists. They desire, however, to state that they express no opinion as to whether the present case is one in which the power ought to be exercised.

There were two other points suggested in argument which deserve some consideration. First, it was said that the difficulty of

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recognizing liens on captured enemy goods might be less in the case of a lien holder being a subject than in the case of his being a neutral. In the case of a neutral it is obvious that the payment of the lien out of the proceeds of a sale of the goods would inure directly to the benefit of the enemy. The enemy debt would thus be paid at the expense of the captors, instead of the neutral being left to recover it in the enemy courts. A right of capture at sea would thus be deprived [166] of its national advantage. On the other hand, if the lienholder be a subject, his right of proceeding in the enemy courts is, if not lost, at any rate suspended by the existence of a state of war. If the right be lost the recognition of the lien would not, it is said, inure to the advantage of the alien enemy, but merely to one of his Majesty's subjects. If the right be merely suspended it could not inure to the advantage of the alien enemy, at any rate until after the war; and the court, it is said, should only consider the existing state of war, and not be guided by what will happen when the war is over. There may be some force in these considerations, but, on the other hand, it is to be remembered that by international comity the Courts of Prize in this country have, in general, extended to neutrals the same advantages as they afford to his Majesty's subjects, and it would be difficult to make an exception. Moreover, both in the case of a neutral and of a subject, the lien holder may have in his hands assets belonging to the enemy to which he can have recourse for the payment of his debt; and into such a matter the courts have no means of inquiring.

The second suggestion does not involve the same difficulty. It is that the rules laid down in the cases referred to should be confined to transactions originating during the war, and that liens created bona fide before the war began might well be recognized whether held by subjects or neutrals. There is, however, no authority for such a distinction, indeed, authority is the other way. See *The Tobago* (1804) 5 C. Rob. 218.

Neither of the above suggestions was seriously pressed on their Lordships, nor could either of them be accepted.

For the foregoing reasons their Lordships will humbly advise his Majesty that the appeal should be dismissed.

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The Cargo *ex* Woolston.

The above judgment in the case of the Cargo *ex* Odessa applies equally in the case of the cargo *ex* Woolston. The only difference between the two cases is that the Odessa was an enemy ship and the Woolston was a British ship. Their Lordships are of opinion that enemy goods on board British ships at the commencement of hostilities are the proper subject of maritime prize. The point has [167] been more fully dealt with in the judgment in *The Roumanian* [1916] A. C. 124, *ante,* 937. The fact that the Woolston was a British ship can therefore have no importance, unless it be necessary for the court to act upon some presumption arising from the character of the ship. It is unnecessary to act on any such presumption where, as in the present case, the whole facts are in evidence and the enemy character of the cargo is fully established.

In this case, also, their Lordships will humbly advise his Majesty that the appeal should be dismissed.

Solicitors for appellants: *Stibbard, Gibson, & Company.*
Solicitor for respondent: *The Treasury Solicitor.*

Note.—Rights of lien holders as to captured property.

An examination of the decisions shows that, subject to certain exceptions presently to be discussed, the courts have uniformly adhered to the principle that capture as prize of war, *jure belli,* overrides all previous liens, including bottomry bonds (*The Tobago* (1804) 5 C. Rob. 218, 1 Eng. P. C. 456; *The Mary* (1815) 9 Cranch, 126, 3 L. ed. 678); mortgages on vessels (*The Aina* (1854) 1 Spinks, Eccl. & Adm. 313, 18 Jur. 682, 2 Eng. P. C. 247; *The Delta* (1862) Blatchf. Prize Cas. 133, Fed. Cas. No. 3,777 (affirmed on other grounds in Blatchf. Prize Cas. 654, Fed. Cas. No. 3,778); *The Hampton* (1866) 5 Wall. 372, 18 L. ed. 659), or cargo (*Bolchos* v. *Darrell* (1795) Bee, 74, Fed. Cas. No. 1,607), the effect of which is merely to create a lien, and not to transfer title, pledges of the cargo and freight money (*The Marianna* (1805) 6 C. Rob. 24, 1 Eng. P. C. 518), or of bills of lading (The Odessa; *The Carlos F. Roses* (1899) 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803), liens on cargo for advances (*The Ida* (1854) 1 Spinks, Eccl. & Adm. 331, 2 Eng. P. C. 268; *The Frances* (1814) 8 Cranch, 335, 3 L. ed. 581; *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609; *The Sally Magee* (*Fry* v. *United States*) (1865) 3 Wall. 451, 18 L. ed. 197, affirming

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Blatchf. Prize Cas. 382, Fed. Cas. No. 12,260; *The Winifred* (1861) Fed. Cas. No. 17,873; *The Mary Clinton* (1863) Blatchf. Prize Cas. 556, Fed. Cas. No. 9,203; *The Lynchburg* (1861) Blatchf. Prize Cas. 49, Fed. Cas. No. 8,637a, affirmed in Blatchf. Prize Cas. 659, Fed. Cas. No. 8,639), liens on the vessel for material and repairs (*The Nassau* (1863) Blatchf. Prize Cas. 665, Fed. Cas. No. 10,028, affirmed in 4 Wall. 634, 18 L. ed. 413; *The Battle* (1868) 6 Wall. 498, 18 L. ed. 933), the claim of the master of the vessel for advances to procure repairs and necessary supplies (*The Velasco* (1861) Blatchf. Prize Cas. 54, Fed. Cas. No. 16,910a), and a claim for alleged balances due a copartner (*United States* v. *The Isaac Hammett* (1862) Fed. Cas. No. 15,446); and see, also, as indorsing the general rule, *The Ariel* (1857) 11 Moore, P. C. C. 119, 2 Eng. P. C. 600; *The Napoleon* (1862) Blatchf. Prize Cas. 296, Fed. Cas. No. 10,012.

The law differs in this respect from the case of property seized as forfeited under the municipal laws of the state. *The Nassau* (1863) Blatchf. Prize Cas. 665, Fed. Cas. No. 10,028.

In none of the decisions has it been regarded as material whether the lien claimant was a citizen of the country making the capture or of a neutral country.

The doctrine that a person taking property takes it subject to existing obligations is not known in prize courts unless in very peculiar cases where the lien is imposed by a general law of the mercantile world independent of any contract between the parties, as in the case of freight upon enemy's goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. "It is, to use the words of Sir W. Scott, 'an interest directly and visibly residing in the substance of the thing itself.' The possession of the property is actually in the owner of the ship, of which, by the general mercantile law of all nations, he cannot be deprived until the freight due for the carriage of it is paid. He has, in fact, a kind of property in the goods by force of this general law which a prize court ought to respect, and does respect. On the one hand, the captor, by stepping into the shoes of the enemy owner of the goods, is personally benefited by the labor of a friend, and ought, in justice, to make him the proper compensation; and, on the other, the shipowner, by not having carried the goods to the place of their destination, and this, in consequence of an act of the captor, would be totally without remedy to recover his freight against the owner of the goods." *The Frances* (1814) 8 Cranch, 418, 3 L. ed. 609.

In the case of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts in deciding upon them, and the door which such a doctrine would open to collusion be-

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tween the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. *The Tobago* (1804) 5 C. Rob. 218; *The Frances, supra.*

"Captors are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents declaring the property to belong to the enemy would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenants and the application of that law in all countries under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions." *The Marianna* (1805) 6 C. Rob. 24, 1 Eng. P. C. 518.

Another reason which has been given is, that liens held by enemy subjects on neutral property are not subject to capture. *The Tobago* (1804) 5 C. Rob. 218.

See also, as to the grounds of the rule, *The Hampton* (1866) 5 Wall. 372, 18 L. ed. 659, as quoted at length in *The Marie Glaeser, ante,* 958.

But where the claimant has not a *jus ad rem,* but a *jus in re,* for the enforcement of which it would not be necessary to resort to a court of justice, the right of the claimant will be respected, as where goods purchased by the claimants were shipped under a bill of lading by which the master was bound to deliver the goods to their order, and they have ordered them to be delivered to themselves, their real character being that of trustees holding the legal title and possession with a right of retention until their advances should be paid. *The Amy Warwick* (1862) 2 Sprague, 150, Fed. Cas. No. 343.

So, in *United States* v. *The Arcola* (1861) Fed. Cas. No. 14,464a, it was held that the considerations which lead prize courts to refuse to recognize liens on enemy property do not apply to the case of a mortgage of a vessel made before the outbreak of hostilities, and regularly recorded under the act of Congress, and indorsed on the certificate of enrolment, under which mortgage something more than a mere lien passes to the mortgagee. E. S. O.

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ACCIDENT INSURANCE.
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Right of alien enemy to sue, or liability to be sued, see War.

What actionable.
1. A surface owner has no cause of action against the owner of subjacent stratum who removes every atom of the mineral contained in that stratum unless and until actual damage results from the removal. The damage, not the withdrawal of support, is the cause of action. West Leigh Colliery Co. v. Tunnicliffe & Hampson, 5: 916 [1908] A. C. 27. Also Reported in 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146.

2. Depreciation in value of the surface owner's property brought about by the apprehension of future damage by subsidence in consequence of removal of the subjacent mineral gives no cause of action by itself. West Leigh Colliery Co. v. Tunnicliffe & Hampson, 5: 916 [1908] A. C. 27. Also Reported in 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146.

Defenses.
3. The objection of want of authority in the solicitor to institute or continue an action must be raised by a proceeding to strike out the case, and cannot be heard at the trial as a defense to the action. Continental Tyre & R. Co. v. Daimler Co. 5: 304 [1915] 1 K. B. 893. Also Reported in [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. Jo. 232.

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Liability of maker of note where blank therein has been filled up with greater sum than that authorized, see Bills and Notes.

ANIMALS.
Duty of owner to restrain by fence, see Fences.
Liability of railroad for killing of, see Railroads.

1. The owner of a horse is not negligent as a matter of law in turning it into a field which he knows or should have known to be defectively inclosed, from which it escapes onto the highway. Per Bankes, J. in Jones v. Lee, 5: 127, 106 L. T. N. S. 123. Also Reported in 76 J. P. 137, 28 Times L. R. 92, 56 Sol. Jo. 125.

2. The act of the owner of a horse not known to be vicious or inclined to attack mankind, in putting it into a field defectively inclosed from which it escapes onto the highway through a gap in the fence of which the owner knew or ought to have known, cannot be considered the proximate cause of an injury to a tandem bicycle and its riders by colliding with the horse, as it suddenly bolted across the road, which fell down and then jumping up lashed out and injured one of the plaintiffs and damaged the bicycle. Jones v. Lee, 5: 127, 106 L. T. N. S. 123. Also Reported in 76 J. P. 137, 28 Times L. R. 92, 56 Sol. Jo. 125.
(Annotated)

3. The act of the owner of fowls in permitting them to stray on the highway cannot be considered as the proximate cause of injury sustained by a bicyclist and his machine which was upset by a fowl which, being frightened by a dog, flew into its spokes. Hadwell v. Righton, 5: 115 [1907] 2 K. B. 345. Also Reported in 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.
(Annotated)

4. *Quære*, whether the occupiers of land adjoining the highway are not entitled to allow their poultry to stray about

the highway? Hadwell v. Righton, 5: 115 [1907] 2 K. B. 345. Also Reported in 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.

APPEAL AND ERROR.

Right of alien enemy to appeal, see War.

An appeal will lie to the Supreme Court of Canada from a judgment for $1,000 with interest from a date anterior to the issuance of the writ, under a statute (60 and 61 Vict. chap. 34, § 1 (c)) authorizing appeals where the amount involved is over $1,000. Canadian R. Acci. Ins. Co. v. McNevin, 5: 870, 32 Can. S. C. 194.

ASSIGNMENT.

Right to rescind assignment of life insurance policy where person insured proves to have been dead at the time, see Insurance.

1. An assignment of claims against a certain person is not invalid as savoring of maintenance or being otherwise against public policy because made in consideration of a covenant by the assignee that if he shall recover the amount of the claim he will pay over to the assignors the amounts of their respective debts or so much thereof as he may be able to realize after payment of the costs necessarily incurred by him; or because of the assignee's ulterior purpose of forcing the debtor into bankruptcy with a view of getting him removed from the directorate of a certain company. Fitzroy v. Cave, 5: 601 [1905] 2 K. B. 364. Also Reported in 74 L. J. K. B. N. S. 829, 54 Week. Rep. 17, 93 L. T. N. S. 499, 21 Times L. R. 612. (Annotated)

2. An assignment of the surplus of a garnished fund, of which notice is given to the garnishee, gives the assignee a right thereto superior to a subsequent garnishment. Yates v. Terry, 5: 446 [1902] 1 K. B. 527. Also Reported in 71 L. J. K. B. N. S. 282, 50 Week. Rep. 293, 86 L. T. N. S. 133, 18 Times L. R. 262. (Annotated)

ASSOCIATIONS.

See Clubs; Labor Organizations.

ATTORNEY AND CLIENT.

Objection of want of authority of attorney to carry on action, when should be raised, see Action.

A firm of solicitors is liable in damages for the fraud perpetrated on a client by their managing clerk, who conducted the conveyancing business of the firm without supervision, in inducing her to sign certain documents, which were neither read over nor explained to her, under a representation that they were necessary to enable the firm to negotiate a sale of her property, but which were in fact a conveyance to himself of the property, which he afterwards disposed of for his own benefit. Lloyd v. Grace, S. & Co. 5: 498 [1912] A. C. 716. Also Reported in 81 L. J. K. B. N. S. 1140, 107 L. T. N. S. 531, 28 Times L. R. 547, 56 Sol. Jo. 723.

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Construction of contract of employment, see Contracts.

Breach of collateral duty by, as affecting right to commission, see Principal and Agent.

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Coupling of cars by, as engaging in more hazardous occupation than that insured, see Insurance.

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Right of undischarged bankrupt to maintain action for damages for breach of contract of employment, see Parties.

Validity of assignment of claim, as affected by assignee's purpose to force debtor into bankruptcy, see Assignment.

BANKS.

Sufficiency of bequest to pass deposit in, see Wills.

The mere fact that a check is drawn with spaces which can be utilized for the purpose of fraudulent alteration is not by itself any violation of duty by the customer to his banker. Colonial Bank v. Marshall, 5: 283 [1906] A. C. 559. Also Reported in 75 L. J. P. C. N. S. 76, 22 Times L. R. 746. (Annotated)

BEQUEST.

See Wills.

BICYCLES.

Liability of owner of horse at large on highway for injury to bicyclist, see Animals.

Liability of owner of fowl which flies into spokes of machine, for injuries sustained by bicyclist, see Animals.

BILLS AND NOTES.

Giving of notes as payment of insurance premiums, see Insurance.

1. The Bills of Exchange Act is now the code of law on the subject, and in cases where it differs from the old law it must prevail; but if the words used in the act are fairly capable of being construed as meaning the same as the words used by judges previously to the act in stating the law, it is right to give them that meaning in the absence of anything to indicate a

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clear intention of the legislature to alter the previous law. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

2. The word "completion" as used in the proviso to § 20, subsection 2 of the Bills of Exchange Act 1882, relating to commercial paper signed in blank and entrusted to another, that "if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands," does not include delivery. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

Estoppel of signer of blank note entrusted to agent.

3. The maker of a promissory note who signed his name on a blank stamped piece of paper and entrusted it to an agent with authority to fill it up as a promissory note for a certain sum payable to another, and to deliver it to such other as security for an advance to be made by him, is, irrespective of the Bills of Exchange Act, under a common-law liability, growing out of estoppel to deny the validity of the obligation, where his agent fraudulently filled up the paper and obtained thereon a larger amount than that authorized. Lloyd's Bank v. Cooke, 5: 666 [1907] 1 K. B. 794. Also Reported in 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429. (Annotated)

4. One who entrusted to an agent blank forms of promissory notes bearing his signature, with instructions to retain them until he should give instructions for their issue as promissory notes and as to the amounts for which they should be filled up, is not estopped where he has never authorized their issue, from denying the validity of the notes as against a bona fide purchaser for value to whom the agent, after filling them up, has sold them. Smith v. Prosser, 5: 682 [1907] 2 K. B. 735. Also Reported in 97 L. T. N. S. 155, 23 Times L. R. 597. (Annotated)

Who are protected as bona fide purchasers.

5. *Quære*, whether the payee of a note can under any circumstances be a holder of it in due course. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

6. A payee of a negotiable instrument, though he may be a holder in due course, is not a holder to whom the note has been "negotiated" within the meaning of the proviso to section 20, subsection 2 of the English Bills of Exchange Act 1882, relating to commercial paper signed in blank and entrusted to another, that "if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given;" and such statutory provision does not therefore enable him to recover upon a note which was signed in blank and entrusted to a third party who filled in the name of the payee, and an amount in excess of that authorized by the maker. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190. (Annotated)

7. One becomes a holder for value who gives a check in exchange for a promissory note, although the check is paid on a forged indorsement of the payee's name. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

8. Mere possession of a promissory note complete and regular on the face of it, and payable to a named payee, is not conclusive evidence that the maker has given authority to the person in whose possession it is to deliver it to the payee. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

9. One in whose presence a note signed in blank is filled up by an agent of the maker is put on inquiry as to the agent's authority, and, by reason of the provision of the English Bills of Exchange Act 1882, § 20, subsection 2, that "in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion it must be filled up within a reasonable time and strictly in accordance with the authority given," can recover only if the agent was acting strictly within his authority. Herdman v. Wheeler, 5: 651 [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

BILLS OF LADING.

Rights of holder of, where property covered is seized as prize, see Prize and Capture.

BLANKS.

Liability of maker of notes where blank left therein has been filled up with greater sum than that authorized, see Bills and Notes.

BLOCKADE.

As proximate cause of breaking up of voyage insured, see Insurance.

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Of competitor's employee by member of a firm as a tort for which the firm is responsible, see Partnership.

BRINE.
Pumping of, as actionable injury to owners of adjoining salt mines, see Mines.

BROKER.
Construction of contract of employment, see Contracts.
Right of, to commission, see Principal and Agent.

BUILDING CONTRACTS.
Promise of owner to see subcontractor paid if he will continue work, as a promise to answer for the debt or default of another, see Contracts.

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Liability of railroad for killing of, see Railroads.

CHAMPERTY AND MAINTENANCE.
In assignment of debt, see Assignment.

CHECKS.
Liability of bank paying raised check, see Banks.
As valuable consideration for promissory note, see Bills and Notes.

CHEQUE.
See Banks.

CLUBS.

1. An ordinary club is formed upon the tacit understanding, judicially recognized, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules. Wise v. Perpetual Trustee Co. **5: 752** [1903] A. C. 139. Also Reported in 72 L. J. P. C. N. S. 31, 51 Week. Rep. 241, 87 L. T. N. S. 569, 19 Times L. R. 125.

2. Trustees of a club who have become personally liable upon obligations incurred on behalf of the club are entitled to indemnity out of any property of the club to which their lien as trustees extends; but the members of the club are not, by reason of being *cestuis que trust*, personally liable to indemnify them where there is no rule imposing such liability upon them. Wise v. Perpetual Trustee Co. **5: 752** [1903] A. C. 139. Also reported in 72 L. J. P. C. N. S. 31, 51 Week. Rep. 241, 87 L. T. N. S. 569, 19 Times L. R. 125.

(Annotated)

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See Bills and Notes.

COMMISSIONS.
Right of broker to, as affected by secret profit, see Principal and Agent.

COMPANY LAW.
See Corporations.

CONDEMNATION.
Of captured property, see Prize and Capture.

CONFLICT OF LAWS.
As to insurance matters.

1. The questions arising under an English policy of marine insurance are to be decided according to English jurisprudence. Andersen v. Marten, **5: 66** [1908] A. C. 334. Also Reported in 77 L. J. K. B. N. S. 950, 99 L. T. N. S. 254, 24 Times L. R. 775, 52 Sol. Jo. 680, 13 Com. Cas. 321.

As to status; marriage; divorce.

2. *Semble*, that in determining whether a foreign court had jurisdiction to grant a divorce, the question of the domicil of the parties to the suit is governed by the law of the state in which the divorce was granted. Bater v. Bater, **5: 717** [1906] Prob. 209. Also Reported in 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408.

3. The domicil for the time being of the married pair when the question of divorce arises, affords the only true test of jurisdiction to dissolve their marriage; and the court of the bona fide existing domicil has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country; and such a divorce will be recognized by the English courts even if granted for a cause which would not have been sufficient to obtain a divorce in England. Bater v. Bater, **5: 717**, L. R. [1906] Prob. 209. Also Reported in 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408.

(Annotated)

4. A divorce granted by a foreign court, being a judgment affecting the status of the parties, stands on the same footing as a judgment *in rem*, and therefore cannot be set aside in England, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced. Bater v. Bater, **5: 717**, L. R. [1906] Prob. 209. Also Reported in 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408.

CONSIDERATION.
Future support of grantor as consideration for deed, see Fraudulent Conveyances.
Giving of time to debtor by creditor as valuable consideration for mortgage, see Mortgages.

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CONTRABAND OF WAR.
Defined, see Definitions.
Scope of warranty against, in policy of marine insurance, see Insurance.

CONTRACTS.
Effect of war upon, see War.
Right of employer to rescind contract of employment for breach on part of workmen, see Master and Servant.

Formal requisites; statute of frauds.

1. A statement made by the owner of a house under construction, to a subcontractor who was threatening to quit in consequence of not getting his pay, that he should go ahead, and that he, the owner, would see him paid, must be considered, in the absence of evidence that the contractor was to be discharged from liability, as an agreement to answer for the default of another within the meaning of the statute of frauds. Boorstein v. Moffatt, 5: 89, 36 N. S. 81. (Annotated)

Construction.

2. Auctioneers employed to sell goods upon a five per cent commission "and all out of pocket expenses" in addition, with a minimum commission of £20, cannot claim that the term "out of pocket expenses" means the gross amount of bills rendered for printing and advertising, without deduction of a trade discount allowed them by the printers and newspaper proprietors. Hippisley v. Knee Bros. 5: 193 [1905] 1 K. B. 1. Also Reported in 74 L. J. K. B. N. S. 68, 92 L. T. N. S. 20, 21 Times L. R. 5.

Validity.

3. An expected war does not render illegal a contract between citizens of the two nations between whom war is anticipated. Janson v. Driefontein Consol. Mines, 5: 810 [1902] A. C. 484. Also Reported in 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.

Rescission.

4. The fact that a contract has become executed does not preclude its rescission on the ground of a mistake which, if the contract had still remained executory, would have warranted rescission. Scott v. Coulson, 5: 792 [1903] 2 Ch. 249. Also Reported in 72 L. J. Ch. N. S. 600, 19 Times L. R. 440.

CORPORATIONS.
Status of, as alien enemies, see War.
Sufficiency of interest in corporate shares to entitle person to maintain an action against transferrer for damages resulting from latter's act in delaying registration of transferee as owner, see Parties.
Measure of damages recoverable by transferee of shares against transferrer for latter's act in delaying registration of transfer, see Damages.
Validity of assignment of debts as affected by assignee's purpose to force debtor out of directorate of corporation, see Assignment.

1. A corporation may continue to conduct its affairs through its employees and agents, though its directors have become disqualified from acting by becoming alien enemies. Continental Tyre & R. Co. v. Daimler Co. 5: 304 [1915] 1 K. B. 893. Also Reported in [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. Jo. 232.

2. Upon a transfer for value of corporate shares the transferrer is under an implied obligation, arising from the relation of grantor and grantee constituted between the parties by the transfer, not to prevent or delay the registration of the transferee as owner of the shares. Hooper v. Herts, 5: 150 [1906] 1 Ch. 549. Also Reported in 75 L. J. Ch. N. S. 253, 54 Week. Rep. 350, 94 L. T. N. S. 324, 13 Manson, 85. (Annotated)

COURTS.
Jurisdiction of prize court, see Prize and Capture.

Relation to other departments of government; political questions.

1. Matters which fall properly to be determined by the Crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts; and rights supposed to be acquired thereunder cannot be enforced by such courts. West Rand Cent. Gold Min. Co. v. Rex, 5: 885 [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

2. Any obligation which may have been incurred by the British Government by reason of the conquest and annexation of the territory of the South African Republic, to discharge obligations incurred by the government of that republic, cannot be enforced by petition of right in any municipal court. West Rand. Cent. Gold Min. Co. v. Rex. 5:885, [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

Rules of decision.

3. The plainer a proposition of law the more difficult it sometimes is to find a decision actually in point; hence no valid argument against a proposition can be made on the dearth of actual decisions on the point. The Roumanian 5: 937 [1916] A. C. 124.

4. Public policy is not a safe or trustworthy ground for a legal decision. Janson v. Driefontein Consol. Mines, 5: 810 [1902] A. C. 484. Also Reported in 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.

5. Considerations of public policy, as

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distinguished from law based upon public policy, should not be a ground of judicial decision. Continental Tyre & R. Co. v. Daimler Co. 5: 304 [1915] 1 K. B. 893. Also Reported in [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. Jo. 232.

6. International law, in the sense that it is the sum of the usages which have received the expressed sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations, is part of the law of England, to be acknowledged and applied by its municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. West Rand Cent. Gold Min. Co. v. Rex, 5: 885 [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

CULVERTS.

Duty of railroad to fence culverts under tracks, see Railroads.

DAMAGES.

Depreciation in value of property from apprehension of future damage by subsidence, as creating right of action, see Actions.

1. In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account. To recover damages the surface owner must wait until the damage or injury caused by subsidence has happened. West Leigh Colliery Co. v. Tunnicliffe & Hampson, 5: 916 [1908] A. C. 27. Also Reported in 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146. (Annotated)

2. The measure of damages recoverable by the transferee of shares against the transferrer for breach of his implied obligation not to prevent or delay registration of the transfer is the difference between the value of the shares at the time when the transferee ultimately got the dominion of them and the value of the shares realized to the best advantage, having regard to the nature of the shares, the state of the market and the possible depreciation of the shares by waiting an undue time, had there been no interference with the registration. Hooper v. Herts, 5: 150 [1906] 1 Ch. 549. Also Reported in 75 L. J. Ch. N. S. 253, 54 Week. Rep. 350, 94 L. T. N. S. 324, 13 Manson, 85.

DEATH DUTY.

See Taxes.

DEED.

Future support of grantor as valuable consideration for, see Fraudulent Conveyances.

DEFINITIONS.

The term "contraband of war," in its natural sense and in the absence of special circumstances or something in the context pointing to another meaning, is applicable to goods only and not to persons. Yangtaze Ins. Asso. v. Indemnity Mut. M. Assur. Co. 5: 53 [1908] 2 K. B. 504. Also Reported in 77 L. J. K. B. N. S. 995, 99 L. T. N. S. 498, 24 Times L. R. 687, 52 Sol. Jo. 550, 13 Com. Cas. 283.

DEPOSIT.

In bank, sufficiency of bequest to carry, see Wills.

DEVISEES AND LEGATEES.

See Wills.

DIVORCE.

Extraterritorial effect of judgment of, see Conflict of Laws.

1. A deserted wife may adopt a domicil acquired by her husband for the purpose of enabling her to bring a suit for divorce. Bater v. Bater, 5: 717, L. R. [1906] Prob. 209. Also Reported in 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408.

2. The failure of the plaintiff in an undefended action for a divorce to disclose to the court the fact that she herself had been guilty of adultery does not so affect the jurisdiction of the court to render a decree of divorce as to expose such decree to collateral attack. Bater v. Bater, 5: 717 [1906] Prob. 209. Also Reported in 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408.

DOMICIL.

Of deserted wife for purpose of divorce suit, see Divorce.

Law governing question of, for the purpose of determining whether foreign court had jurisdiction of divorce suit, see Conflict of Laws.

EMPLOYEES.

See Master and Servant.

ENEMY.

See War.

ESTATE DUTY.

See Taxes.

ESTOPPEL.

Of maker of promissory note filled up by agent for amount in excess of his authority, see Bills and Notes.

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EVIDENCE.
Of existence of rule of international law, see International Law.
Possession of promissory note as evidence of authority to deliver it, see Bills and Notes.

FENCES.
Duty of railroad to fence, see Railroads.

At common law the owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway. Per Bankes J., in Jones v. Lee, **5: 127,** 106 L. T. N. S. 123. Also Reported in 76 J. P. 137, 28 Times L. R. 92, 56 Sol. Jo. 125.

FIRM.
See Partnership.

FORGERY.
Liability of bank paying raised check, see Banks.

FOWLS.
Right of owner of, to allow to stray upon highway, see Animals.
Liability of owner for injury resulting from fowl flying into spokes of bicycle, see Animals.

FRAUD.
Liability of principal for fraud of agent, see Principal and Agent.
Liability of attorney for fraud of managing clerk, see Attorney and Client.

FRAUDULENT CONVEYANCES.
Validation of mortgage voidable as to creditors, by *ex post facto* consideration, see Mortgages.

A deed the sole consideration for which is the future support of the grantor and his wife by the grantee is not upon a valuable consideration within the meaning of the statute of Elizabeth. Conrad v. Corkum, **5: 271,** 35 N. S. 288.

FUTURE SUPPORT.
Of grantor as valuable consideration for deed, see Fraudulent Conveyances.

GARNISHMENT.
Effect of assignment of surplus of garnished fund, see Assignment.

GUARANTY.
Statement by owner of building to subcontractor that if he will go on with the work, he will see him paid, as a guaranty, see Contracts.

HAGUE CONVENTION, 1907.
See Prize and Capture; War.

HIGHWAYS.
Right of abutting owner to allow poultry to stray upon highway, see Animals.
Liability of owner of animals at large on highway for injuries sustained by travelers in consequence, see Animals.

HORSE.
Liability of owner of, for injury to travelers upon highway, see Animals.

HUSBAND AND WIFE.
See Divorce.

INJUNCTION.
Against use of name by another, see Tradename.
Right of owners of adjoining salt mines to enjoin pumping of brine the effect of which is to carry away their mineral in solution, see Mines.

An injunction may be issued to restrain the seller of standing timber from preventing the purchaser from entering upon the property to remove it, notwithstanding the court could not have compelled the purchaser to cut the timber had he refused to do so. James Jones & Sons v. Tankerville, **5: 202,** [1909] 2 Ch. 440. Also Reported in 78 L. J. Ch. N. S. 674, 101 L. T. N. S. 202, 25 Times L. R. 714.

(Annotated)

INSURANCE.
Law governing policies of marine insurance, see Conflict of Laws.

1. In case of a real doubt arising in the construction of a policy, the construction most favorable to the insured must prevail. Canadian R. Acci. Ins. Co. v. McNevin, **5: 870,** 32 Can. S. C. 194.

Accident insurance.

2. The word "voluntary," as used in the clause of an accident insurance policy which exempts the insurer from liability in case of death resulting from voluntary exposure to unnecessary danger, conveys the idea of an act of volition. It means "knowingly," "wilful," not that the insured is going knowingly to perform an act which for others might be dangerous, but "knowingly," "rashly," and conscious of danger to himself, recklessly, taking the risk, wanton or grossly imprudent exposure. Canadian R. Acci. Ins. Co. v. McNevin, **5: 870,** 32 Can. S. C. 194.

3. The act of a baggageman employed about a railroad station, in coupling cars at the request of a brakeman on a train at the station, cannot be considered as a "voluntary exposure to unnecessary danger" within the exception clause of an accident insurance policy, where the evidence shows

that the insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous. Canadian R. Acci. Ins. Co. v. McNevin, **5: 870,** 32 Can. S. C. 194. (Annotated)

4. A baggageman employed about a railroad station, where he was in fact "a man of all work" subject to the agent's directions and to his own sense of duty in the interest of his employers, who was killed while performing an isolated and transient act of coupling cars cannot be deemed to have been injured in a more hazardous occupation than that stated in his application, within the provision of an accident insurance policy that in such case his insurance should be only for such sums as the premium paid by him would purchase at the rates fixed for such increased hazard. Canadian R. Acci. Ins. Co. v. McNevin, **5: 87,** 32 Can. S. C. 194.

Assignment of policy.

5. A mistaken belief on the part of the parties to an assignment of a policy of life insurance, that the person whose life is insured is still alive, is not one relating to a collateral matter, but goes to the substance of the transaction and will therefore warrant its rescission. Scott v. Coulson, **5: 792,** [1903] 2 Ch. 249. Also Reported in 72 L. J. Ch. N. S. 600, 19 Times L. R. 440. (Annotated)

Loss; liability of insurer.

6. An insurer is not legally liable in respect of a loss happening during the existence of hostilities between the respective countries of the assured and the insurer. Janson v. Driefontein Consol. Mines, **5: 810,** [1902] A. C. 484. Also Reported in 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.

7. Where a subject of a foreign government insures treasure with British underwriters against capture during its transit from the foreign state to England, and the foreign government seizes the treasure during the transit and war is afterwards declared between the foreign and the British government, the insurance is valid and an action may be maintained in England against the underwriters after the restoration of peace, the seizure having been made before the declaration of war, though in contemplation of war and in order to use the treasure in support of the war. Janson v. Driefontein Consol. Mines, **5: 810,** [1902] A. C. 484. Also Reported in 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268. (Annotated)

8. The insurer of a neutral vessel against perils of the seas only, is not liable for the loss of the vessel by wreck after having been seized by a belligerent as carrying contraband and while being navigated towards a court of prize, where her subsequent condemnation by the prize court, relating back to the time of seizure, shows that at the time of the wreck the insured had lost his vessel by capture. Andersen v. Marten, **5: 66,** [1908] A. C. 334. Also Reported in 77 L. J. K. B. N. S. 950, 99 L. T. N. S. 254, 24 Times L. R. 775, 52 Sol. Jo. 680, 13 Com. Cas. 321. (Annotated)

9. The insurer of a cargo against "all consequences of . . . hostilities or warlike operations" is not liable for a loss incurred in consequence of the act of the master under powers conferred upon him by the bill of lading in refusing to proceed with the voyage upon learning of the blockade of the port of destination, such loss being due, not to the consequences of hostilities, but to a proper exercise by the master of his discretion under the bill of lading. Nickels & Co. v. London & P. M. & G. Ins. Co. **5: 1,** 70 L. J. Q. B. N. S. 29. Also Reported in 17 Times L. R. 54, 6 Com. Cas. 15. (Annotated)

Premium; giving note as payment.

10. Evidence that at the time a renewal premium on a policy of life insurance became due the assured gave the local agent of the insurance company, to whom, under a provision of the policy, premiums might be paid, a sixty day note for the amount of the premium and interest thereon, which the agent caused to be discounted, placing the proceeds to his own credit in his bank account, without, however, countersigning or delivering the renewal receipt in his hands or remitting the amount of the premium to the company, but attaching the receipt to the note; that when this note became due it was not paid by the assured but was renewed for a smaller sum, the agent paying the difference to the bank together with the discount on the renewal; that upon its maturity a second renewal note was given, during the currency of which the assured died, and which at its maturity was taken up by the agent,—does not warrant the jury in finding that the premiums had been paid in cash to the company at the time when the local agent discounted the first note and received the proceeds. Hutchings v. National Life Assur. Co. **5: 356,** 37 Can. S. C. 124. (Annotated)

Warranties; against contraband.

11. A warranty in a policy of reinsurance of "no contraband of war on basis of cable . . . attached hereto" must be regarded as relating only to the cargo where the original policy contained a warranty "not to carry cargo other than kerosene oil" and the cablegram stated that the Japanese government would not regard kerosene as contraband. Yangtsze Ins. Asso. v. Indemnity Mut. M. Assur. Co. **5: 53,** [1908] 2 K. B. 504. Also Reported in 77 L. J. K. B. N. S. 995, 99 L. T. N. S. 498, 24 Times L. R. 687, 52 Sol. Jo. 550, 13 Com. Cas. 283.

12. *Semble*, that the transportation of military officers of a belligerent state as passengers aboard a neutral ship is not a breach of a warranty against "contraband

of war" in a policy of marine insurance. Yangtsze Ins. Asso. v. Indemnity Mut. M. Assur. Co. 5: 53, [1908] 2 K. B. 504. Also Reported in 77 L. J. K. B. N. S. 995, 99 L. T. N. S. 498, 24 Times L. R. 687, 52 Sol. Jo. 550, 13 Com. Cas. 283. (Annotated)

INTERNATIONAL LAW.

See also Prize and Capture; War.

Force of, in municipal courts, see Courts.

The pronouncements of writers on international law cannot be considered as conclusive evidence of the existence of the rules enunciated by them. West Rand Cent. Gold Min. Co. v. Rex, 5: 885, [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

INTERVENING CAUSE.

See Proximate Cause.

JUDGMENT.

Collateral attack upon judgment rendered in another jurisdiction, see Conflict of Laws.

LABOR ORGANIZATIONS.

1. A trade union is not liable for the act of the officials of one of its branches in inducing workmen to strike in breach of their contracts, where the strike was called without a ballot and without the sanction of the central council prescribed by the rules of the union. Denaby & C. Main Collieries v. Yorkshire Miners' Asso. 5: 452, [1906] A. C. 384. Also Reported in 75 L. J. K. B. N. S. 961, 95 L. T. N. S. 561, 22 Times L. R. 543. (Annotated)

2. Where a strike which was wrongful because of the workmen's violation of their contracts to work for a definite period becomes lawful by reason of the employer's act in treating the old contracts as rescinded, a labor organization which thereafter grants strike pay to the strikers is not liable for the damages occasioned by the continuance of the strike; and it is immaterial that the granting of strike pay under the particular circumstances of the case was not within the authority conferred upon its officials by the rules of the organization. Denaby & C. Main Collieries v. Yorkshire Miners' Asso. 5: 452, [1906] A. C. 384. Also Reported in 75 L. J. K. B. N. S. 961, 95 L. T. N. S. 561, 22 Times L. R. 543.

LANDLORD AND TENANT.

1. A tenant holding under an agreement of tenancy "for a period of 12 months with the option of a lease after the aforesaid time at the rental of £30 per annum" has a right to claim a lease for a further period of at least one year after the expiry of the first 12 months. Austin v. Newham, 5: 853, [1906] 2 K. B. 167. Also Reported in 75 L. J. K. B. N. S. 563, 95 L. T. N. S. 490. (Annotated)

2. *Semble*, that a covenant for a lease the term of which is not specified gives the covenantee a right to claim a lease for his life. Per Kennedy, J., in Austin v. Newham, 5: 863, [1906] 2 K. B. 167. Also Reported in 75 L. J. K. B. N. S. 563, 95 L. T. N. S. 490.

LAWYERS.

See Attorney and Client.

LEASES.

Right of tenant under indefinite option of renewal, see Landlord and Tenant.

LEGACY.

See Wills.

LICENSE.

Quære, whether a contract for the sale of timber to be cut by the purchaser does not confer an interest at law of such a nature as to make the license to enter and cut *ab initio* an irrevocable license. James Jones & Sons v. Tankerville, 5: 902, [1909] 2 Ch. 440. Also Reported in 78 L. J. Ch. N. S. 674, 101 L. T. N. S. 202, 25 Times L. R. 714.

LIENS.

Right of holders of liens on captured property, see Prize and Capture.

LIFE INSURANCE.

See Insurance.

MAINTENANCE.

See Champerty and Maintenance.

MANAGING CLERK.

Liability of attorney for fraud of, see Attorney and Client.

MARINE INSURANCE.

See Insurance.

MARRIAGE.

See Divorce.

MASTER AND SERVANT.

Right of undischarged bankrupt to maintain action for damages for breach of contract of employment, see Parties.

Matters relating to strikes, see Strikes.

Where workmen have left their employment without giving the necessary notice, the employer has the right to treat existing contracts at an end, and may lawfully require them to enter into new contracts before returning. Denaby & C. Main Collieries v. Yorkshire Miners' Asso. 5: 452, [1906] A. C. 384. Also Reported in 75 L. J. K. B. N. S. 961, 95 L. T. N. S. 561, 22 Times L. R. 543.

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MAXIMS.

Causa proxima non remota spectatur. Hadwell v. Righton, **5: 115,** [1907] 2 K. B. 345. Also Reported in 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.

MINERALS.

See Mines.

MINES.

When cause of action in favor of owner of surface in consequence of removal of subjacent support accrues, see Action.

Damages recoverable by surface owner for removal of subjacent support, see Damages.

Right of land owner to percolating waters as giving him right to pump up another's mineral in solution, see Waters.

As between parties who acquired from the same owner their respective rights in a group of rock salt mines which had become flooded with brine and which, in consequence of being connected by old channels and passages which it was no longer possible to close, formed one reservoir of brine, the one who subsequently acquired his property cannot obtain damages or an injunction as against another who had previously acquired the right to pump brine from a connected mine, notwithstanding the effect of his so doing is to carry away in solution salt of the neighboring proprietors. Salt Union v. Brunner, M. & Co. **5: 242,** [1906] 2 K. B. 822. Also Reported in 22 Times L. R. 835, 76 L. J. K. B. N. S. 55, 95 Times L. R. 647.

MORTGAGES.

Validity.

1. The giving of time to a debtor by a creditor who was pressing for payment is a valuable consideration for a mortgage given to him as security. Conrad v. Corkum, **5: 271,** 35 N. S. 288.

2. A mortgage voidable at the instance of creditors as having been made without consideration and in fraud of creditors becomes valid upon its assignment by the mortgagee at the instance of the mortgagor to a creditor of the mortgagor who was pressing for payment. Conrad v. Corkum, **5: 271,** 35 N. S. 288. (Annotated)

Priority.

3. Although a mortgage originally void as having been given in fraud of creditors and without consideration is validated by an assignment by the mortgagee at the instance of the mortgagor to a creditor of the latter, it will constitute a lien inferior to a second mortgage given by the mortgagor prior to the assignment. Conrad v. Corkum, **5: 271,** 35 N. S. 288.

Extension of time to purchaser of mortgaged property.

4. A mortgagor, who sells the mortgaged property subject to the mortgage, which the purchaser assumes and agrees to pay, does not thereby become a surety for the payment of the mortgage debt in any such sense that an extension of time given to the grantee by the mortgagee will operate to discharge him from liability, if, by reason of the expiration of such extension at the time when his covenant to pay is sought to be enforced, the mortgagee is in a position to restore the estate untrammelled by such agreement. Forster v. Ivey, **5: 614,** 2 Ont. L. Rep. 480. (Annotated)

NAME.

Right to enjoin use of, by another, see Tradename.

NEGLIGENCE.

Of owner of animals, see Animals.

Form in which check is drawn as breach of duty to bank, see Banks.

NEGOTIABLE INSTRUMENTS LAW.

See Bills and Notes.

NOTICE.

Existence of blank in promissory note as putting taker upon inquiry as to scope of agent's authority to fill up, see Bills and Notes.

OFFICERS.

Liability of trade union for acts of, see Labor Organizations.

OPTION.

Right of tenant under option for renewal of lease for indefinite period, see Landlord and Tenant.

PARTIES.

Right of alien enemy to sue, or liability to be sued, see War.

Persons who may sue.

1. An undischarged bankrupt employed as traveler for a firm under a contract made before the commencement of the bankruptcy can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in bankruptcy not having intervened in the action. Bailey v. Thurston & Co. **5: 258,** [1903] 1 K. B. 137. Also Reported in 72 L. J. K. B. N. S. 36, 51 Week. Rep. 162, 88 L. T. N. S. 75, 10 Manson, 1. (Annotated)

2. One who has advanced money upon a stock certificate accompanied by a blank transfer, which he in turn pledged to a bank from which he obtained the money, and who, upon the borrower's default, concurred in the insertion of his name by the

bank in the blank transfer, has a sufficient interest in the shares to enable him to sue the registered owner for the damages resulting from the latter's act in delaying the registration of the transferee as owner of the shares. Hooper v. Herts, 5: 150, [1906] 1 Ch. 549. Also Reported in 75 L. J. Ch. N. S. 253, 54 Week. Rep. 350, 94 L. T. N. S. 324, 13 Manson, 85.

PARTNERSHIP.

The members of a firm are liable for the act of one of them in bribing a competitor's clerk to disclose confidential matters relating to his employer's business, where the obtaining by legitimate means of information in regard to moves made by competitors is within the ordinary course of the firm's business. Hamlyn v. John Houston & Co. 5: 82, [1903] 1 K. B. 81. Also Reported in 72 L. J. K. B. N. S. 72, 87 L. T. N. S. 500, 19 Times L. R. 66.

(Annotated)

PATENTS.

Appeal by alien enemy from decree revoking, whether suspended during continuance of war, see War.

PERCOLATING WATERS.

See Waters.

PETITION OF RIGHT.

Sufficiency of, see Pleading.

PLEADING.

Declaration or complaint.

1. It is not sufficient to allege what may be a ground of action if something else be added which is not stated. Upon all sound principles of pleading it is necessary to allege what must, and not what may be, a cause of action. West Rand Cent. Gold Min. Co. v. Rex, 5: 885, [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

2. A petition of right alleging in substance that, before the outbreak of war between the South African Republic and Great Britain, gold, the produce of the mines in the Republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the government of the Republic, that the government by the laws of the Republic was liable to return the gold or its value to the suppliants, and that by reason of the conquest and annexation of the territories of the Republic by Great Britain the obligations of the Republic towards suppliants in respect of the gold became binding upon the government of Great Britain,—is insufficient as failing to show any obligation of a contractual nature on the part of the South African Republic. West Rand Cent. Gold Min. Co. v. Rex, 5: 885, [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.

Pleas and answers; what must be pleaded.

3. Where plaintiff does not declare on a guaranty, but brings an action for work done and materials furnished at defendant's request, the defendant need not plead the statute of frauds in order to be entitled to set up the claim that his promise was one to answer for the debt or default of another and as such void because not in writing. Boorstein v. Moffatt, 5: 89, 36 N. S. 81.

PLEDGE.

Right of pledgee of property seized as prize, see Prize and Capture.

POULTRY.

Right of owner of, to allow to stray upon highway, see Animals.

PRACTICE AND PROCEDURE.

See Actions; Appeal and Error; Pleading; Writ and Process.

PREMIUM.

See Insurance.

PRINCIPAL AND AGENT.

Possession of promissory note as evidence of authority to deliver it, see Bills and Notes.

Estoppel of principal where agent fills up blanks in promissory note entrusted to him for an amount in excess of that authorized, see Bills and Notes.

Power to bind principal.

1. Where an agent in contracting on behalf of his principal has acted within the terms of a written authority given to him by the principal but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted in good faith, repudiate liability on the contract on the ground that the agent in making it acted in his own interest and not in that of the principal. Hambro v. Burnand, 5: 480, [1904] 2 K. B. 10. Also Reported in 73 L. J. K. B. N. S. 669, 52 Week. Rep. 583, 90 L. T. N. S. 803, 20 Times L. R. 398, 9 Com. Cas. 251.

(Annotated)

Principal's liability for agent's fraud.

2. A principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him, although such act may be directly contrary to the instructions of his principal; or even criminal. Hamlyn v. John Houston & Co. 5: 82, [1903] 1 K. B. 81. Also Reported in 72 L. J. K. B. N. S. 72, 87 L. T. N. S. 500, 19 Times L. R. 66.

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3. A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Lloyd v. Grace, S. & Co. **5: 498,** [1912] A. C. 716. Also Reported in 81 L. J. K. B. N. S. 1140, 107 L. T. N. S. 531, 28 Times L. R. 547, 56 Sol. Jo. 723. (Annotated)

Right of agent to compensation.

4. An agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal, but is not entitled to any commission from his principal. Andrews v. Ramsay & Co. **5: 184,** [1903] 2 K. B. 635. Also Reported in 72 L. J. K. B. N. S. 865, 89 L. T. N. S. 450, 19 Times L. R. 620, 52 Week. Rep. 126. (Annotated)

5. Auctioneers employed to sell goods for which they were to receive a commission and all out of pocket expenses are not to be deprived of their commission by reason of their retention of a trade discount upon printing and advertising bills paid by them in the bona fide belief that they were justified by custom in so doing, their breach of duty to account correctly for the out of pocket expenses being with respect to a matter merely incidental to and separable from their main duty. Hippisley v. Knee Bros. **5: 193,** [1905] 1 K. B. 1. Also Reported in 74 L. J. K. B. N. S. 68, 92 L. T. N. S. 20, 21 Times L. R. 5. (Annotated)

PRINCIPAL AND SURETY.

Relation of, as between mortgagor and purchaser of the mortgaged property, see Mortgages.

PRIORITY.

As between mortgagees, see Mortgages.

As between assignment of surplus of garnished fund and subsequent garnishment, see Assignment.

PRIVATE INTERNATIONAL LAW.

See Conflict of Laws.

PRIZE AND CAPTURE.

What property subject to capture.

1. In determining the national character of property, legal ownership is the sole criterion. The Odessa, **5: 979,** [1916] A. C. 145.

2. Shareholders in a vessel under the flag of an alien enemy have no right in law, whatever their nationality, to be protected from any result of capture of the vessel. The Marie Glaeser, **5: 958,** L. R. [1914] Prob. 218. Also Reported in 31 Times L. R. 8, 59 Sol. Jo. 8.

3. A cargo owned by an alien enemy is not immune from liability to seizure and condemnation as prize by reason of having been shipped before the outbreak of hostilities in a vessel of the country making the seizure. The Roumanian, **5: 937,** [1916] A. C. 124; The Woolston, **5: 979, 1002,** [1916] A. C. 145.

4. Art. 3 of The Hague Convention of 1907, which provides that "Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, upon payment of compensation," does not preclude the condemnation and sale by a British prize court of a German vessel captured under such circumstances, Germany not having reciprocally accepted the terms of such article. The Marie Glaeser, **5: 958,** L. R. [1914] Prob. 218. Also Reported in 31 Times L. R. 8, 59 Sol. Jo. 8.

5. A cargo of oil which has become liable to seizure and condemnation as maritime prize upon the outbreak of hostilities does not cease to be so liable as respects the part which has been discharged for safe custody into tanks on shore before the actual seizure, whether or not the tanks form part of the port. The Roumanian, **5: 937,** [1916] A. C. 124. (Annotated)

Sufficiency of seizure.

6. A cargo is effectually seized as prize by delivering to the master of the ship a letter from the custom house authorities stating that the cargo is placed under detention, although the letter does not refer to detention as prize. The Roumanian, **5: 937,** [1916] A. C. 124.

Rights of lienors.

7. The holder of a lien upon captured property may not assert it in a prize court, but must look to the bounty of the government for reimbursement. The Marie Glaeser, **5: 958,** L. R. [1914] Prob. 218. Also Reported in 31 Times L. R. 8, 59 Sol. Jo. 8. (Annotated)

8. The British prize court will not recognize the claim of a pledgee of cargo seized as prize the legal ownership of which was at the time of seizure in an enemy subject; and this rule applies to a pledgee who is holder of the bills of lading and is named therein as consignee of the cargo. The Odessa, **5: 979** [1916] A. C. 145. (Annotated)

9. The claims of persons who have advanced money for necessaries to a vessel which has been seized as a prize cannot be recognized by the prize court; but they must look to the bounty of the government for reimbursement. The Marie Glaeser, **5: 958,** L. R. [1914] Prob. 218. Also Reported in 31 Times L. R. 8, 59 Sol. Jo. 8.

Jurisdiction of prize court.

10. The jurisdiction of the prize court

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extends to the portion of a cargo discharged on shore at the time of seizure, since that jurisdiction depends not upon the situation of the cargo when seized but upon the fact that it has been seized as prize. The Roumanian, 5: 937, [1916] A. C. 124.

Hearing and determination.

11. An appearance in a British prize court in behalf of an alien enemy will be stricken out where the affidavit stating the grounds of his claim, filed according to order 3, Rule 5 of Prize Court Rules, 1914, fails to show that the hostile character of the claimant is suspended in any way giving him a right to be heard in such court. The Marie Glaeser, 5: 958, L. R. [1914] Prob. 218. Also Reported in 31 Times L. R. 8, 59 Sol. Jo. 8.

12. The power of bounty which the British Crown has been accustomed to exercise by way of redress of hardship to subjects or neutrals from decrees of the prize court exists unimpaired by the Civil List Acts. The Odessa, 5: 979, [1916] A. C. 145.

PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.

See Contracts.

PROXIMATE CAUSE.

Blockade as proximate cause of breaking up of voyage, see Insurance.

Act of owner in permitting fowl to stray on highway as proximate cause of injury to bicyclist upset by fowl flying into spokes of machine, see Animals.

Act of owner of horse in putting it into field defectively inclosed, from which it escapes on to the highway, as proximate cause of injury to traveler, see Animals.

PUBLIC POLICY.

As affecting validity of assignment of debt, see Assignment.

As ground for judicial decision, see Courts.

RAILROADS.

Powers.

1. A railway company may not, as incidental to its granted powers, maintain an omnibus service for the distribution and collection of its passengers,—at least where in so doing it is carrying on what is virtually a distinct business of transporting people, irrespective of whether they are travelers by its railroad. Atty. Gen. ex rel. Birkenhead v. Mersey R. Co. 5: 764, [1907] A. C. 415. Also Reported in 76 L. J. Ch. N. S. 568, 71 J. P. 448, 97 L. T. N. S. 524, 23 Times L. R. 684.

(Annotated)

Duty to fence.

2. The statutory duty imposed on a railroad company to fence its right of way does not impose on it an obligation to erect or maintain a fence on each side of a culvert across a water course under its tracks so as to render it liable where cattle went through the culvert into a field, and from thence to the highway, and, straying on to the railway tracks, were killed. Grand Trunk R. Co. v. James, 5: 168, 31 Can. S. C. 420. (Annotated)

REINSURANCE.

See Insurance.

RESCISSION.

Of contract, see Contracts.

Of assignment of life insurance policy where person insured proves to be dead at the time, see Insurance.

Of contract of employment by employer for breach on part of workmen, see Master and Servant.

RESIDUARY LEGATEE.

Right of, to residuary real estate, see Wills.

ROCK SALT.

Pumping brine as injury to owners of adjoining property, see Mines.

SALES.

Duty of seller of stock in corporation not to prevent or delay registration of transfer, see Corporations.

Right of purchaser of standing timber to enjoin seller from preventing his entering upon the property to remove it, see Injunction.

Nature of license to enter and cut standing timber incident to sale thereof, see License.

SALT.

Pumping brine as injury to adjoining owners of saline deposits, see Mines.

SECRET PROFIT.

As affecting broker's right to commission, see Principal and Agent.

SEIZURE.

Insurance as covering seizure by the government of the country of the insured prior to the breaking out of war between the countries of the insurer and of the assured, and in contemplation thereof, see Insurance.

SHIPPING.

Seizure of, as prize of war, see Prize and Capture.

SOLICITORS.

See Attorney and Client.

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SPECIFIC PERFORMANCE.
Inability of court to grant, as ground for denying injunction, see Injunction.

STATUTE OF FRAUDS.
See also Contracts.
Necessity of pleading, see Pleading.

STATUTES.
Construction of Bills of Exchange Act, see Bills and Notes.

STOCK.
Of corporations, see Corporations.
Live stock, see Animals.

STREET.
See Highways.

STRIKES.
Liability of trade union for acts of officials in calling strike, see Labor Organizations.

Where workmen strike in breach of their contracts, those who help to maintain the strike by money and counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers. Denaby & C. Main Collieries v. Yorkshire Miners' Asso. **5: 452,** [1906] A. C. 384. Also Reported in 75 L. J. K. B. N. S. 961, 95 L. T. N. S. 561, 22 Times L. R. 543.

SUBTERRANEAN WATERS.
See Waters.

SUCCESSION TAX.
See Taxes.

SUPPORT.
Depreciation in value of property from apprehension of future damage by subsidence as creating right of action, see Actions.
Damages recoverable by surface owner for removal of, by working of minerals, see Damages.

TAXES.
The effect of a statute (Wills Act 1837, § 33) providing that under certain conditions a devise or bequest shall not lapse upon the death of the devisee or legatee in testator's lifetime "but shall take effect as if the death of such person had happened immediately after the death of the testator unless the contrary intention shall appear by the will," is to render property so devised twice liable to the estate duty imposed by a statute (Finance Act 1894) upon the value of all property passing on the death of persons dying after a specified date, which property the act provides (§ 2, subsection 1) "shall be deemed to include . . . property of which the deceased was at the time of his death competent to dispose." Re Scott, **5: 840,** [1901] 1 Q. B. 228. Also Reported in 70 L. J. Q. B. N. S. 66, 65 J. B. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148.
(Annotated)

TIMBER.
Nature of license to enter and cut, incidental to sale of standing timber, see License.
Right of purchaser to an injunction to restrain seller from preventing his entry to remove it, see Injunction.

TORTS.
Liability of principal for tort of agent, see Principal and Agent.
Liability of firm for tort of partner in course of business, see Partnership.

The exercise of a lawful right does not become unlawful because it may injure others. Salt Union v. Brunner, M. & Co. **5: 242,** [1906] 2 K. B. 822. Also Reported in 22 Times L. R. 835, 76 L. J. K. B. N. S. 55, 95 Times L. R. 647.

TRADENAME.
One who advertises his goods in such a manner as to lead the public to believe that another is in some way connected with his enterprise may be enjoined from so doing at the instance of such other, although they are not rivals in trade, where the effect of his act is to expose such other to a probable risk of litigation. Walter v. Ashton, **5: 336;** [1902] 2 Ch. 282. Also Reported in 71 L. J. Ch. N. S. 839, 18 Times L. R. 445, 51 Week. Rep. 131.
(Annotated)

TRADE UNION.
See Labor Organizations.

TREES.
See Timber.

TRUSTS.
The rule that trustees are entitled to be indemnified by their *cestuis que trust* against liabilities incurred by their holding trust property does not apply to cases where the nature of the transaction excludes it. Wise v. Perpetual Trustee Co. **5: 752,** [1903] A. C. 139. Also Reported in 72 L. J. P. C. N. S. 31, 51 Week. Rep. 241, 87 L. T. N. S. 569, 119 Times L. R. 125.

UNDERGROUND WATERS.
See Waters.

VALUABLE CONSIDERATION.
Giving of time to debtor by creditor as, see Mortgages.
Check as valuable consideration for promissory note, see Bills and Notes.

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VENDOR AND PURCHASER.

Right of purchaser of standing timber to enjoin seller from preventing his entering upon the property to remove it, see Injunction.

Contract for sale of standing timber as conferring an irrevocable license, see License.

WAR.

See also Prize and Capture.

Effect of war on validity of contracts, see Contracts.

Service of process in action against alien enemy, see Writ and Process.

Liability of insurer for loss happening during existence of hostilities between countries of assured and insurer, see Insurance.

Insurance as covering seizure by the government of the country of the insured prior to the breaking out of war between the countries of the insurer and of the assured, and in contemplation thereof, see Insurance.

Insurance against war risks, see Insurance.

Alien enemies; who are.

1. The test of a person being an alien enemy is not his nationality, but the place in which he resides or carries on business. A person voluntarily resident in or who is carrying on business in an enemy's country is an alien enemy. Porter v. Freudenberg, **5: 548,** [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.

2. The status of a corporation as an alien enemy is to be determined by its place of incorporation and not by the nationality of its shareholders or of a majority of them. Janson v. Driefontein Consol. Mines, **5: 810,** [1912] A. C. 484. Also Reported in 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.

3. A domestic corporation cannot be considered as having the status of an alien enemy because all of its directors and nearly all of its stockholders have become such; and it may therefore during the war enforce payment of a debt due to it. Continental Tyre & R. Co. v. Daimler Co. **5: 304,** [1915] 1 K. B. 893. Also Reported in [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. Jo. 232. (Annotated)

— rights, duties and disabilities.

4. An alien enemy, unless in the country under the license of the government, cannot maintain an action. Porter v. Freudenberg, **5: 548,** [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216. (Annotated)

5. The common-law rule by which an alien enemy is precluded from enforcing his rights of action during the continuance of war is not abrogated by Art. 23 (h) of chap. 1, § 2 of the Annex to the Hague Convention of 1907, by which it is forbidden to "declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings," but such provision is, in view of its collocation, to be read as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or protect their civil rights. Porter v. Freudenberg, **5: 548,** [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.

6. An alien enemy who is plaintiff in an action commenced before the outbreak of war has no right of appeal; his right to appeal is suspended until the conclusion of peace. Porter v. Freudenberg, **5: 548,** [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.

7. An alien enemy may be sued, and if sued he has a right to enter an appearance and to defend the action, and may also appeal against any decision, final or interlocutory, that may be given against him. Porter v. Freudenberg, **5: 548,** [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109 [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216. (Annotated)

8. An alien enemy who is respondent to a petition for revocation of a patent, and against whom the operation of a decree revoking the patent is suspended by an appeal, cannot claim that the hearing of the appeal must be suspended during the war. Porter v. Freudenberg, **5: 548,** [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.

9. The appointment of a person by the board of trade under subsection 2 of the Trading with the Enemy Act 1914, with authority to inspect a corporation's books and documents and to require information as to the business carried on by it, does not amount to an implied license to trade under the protection of the Crown, or to authority to carry on business in Great Britain. Continental Tyre & R. Co. v. Daimler Co. **5: 304,** [1915] 1 K. B. 893. Also Reported in [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. Jo. 232.

Conquests and resulting rights.

10. It cannot be considered as an estab-

lished rule of international law that after annexation of conquered territory the conquering state, in the absence of an express limitation of the obligations to be taken over, becomes bound to fulfil the obligations of the conquered state. West Rand Cent. Gold Min. Co. v. Rex, **5: 885,** [1905] 2 K. B. 391. Also Reported in 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562. (Annotated)

WARRANTY.

In policies of insurance, see Insurance.

WATERS.

Semble, that the right of the owner of land to pump up percolating waters therein does not, where matters are in their natural condition, give him the right thereby to obtain another's mineral in solution. Salt Union v. Brunner, M. & Co. **5: 242,** [1906] 2 K. B. 822. Also Reported in 22 Times L. R. 835, 76 L. J. K. B. N. S. 55, 95 Times L. R. 647. (Annotated)

WILLS.

Effect of statutes designed to prevent lapsing of testamentary provisions upon death of beneficiary in testator's lifetime, to render the property bequeathed twice liable to estate duty, see Taxes.

1. Moneys on deposit at a testator's bank, whether notice of withdrawal is or is not required in respect of the same, will pass under a bequest of "moneys owing to me at the time of my decease." Re Derbyshire, **5: 534,** [1906] 1 Ch. 135. Also Reported in 75 L. J. Ch. N. S. 95, 54 Week. Rep. 135, 94 L. T. N. S. 138. (Annotated)

2. Money on deposit with a testator's bankers, and subject to more than 24 hours notice of withdrawal, will not pass under a bequest of "ready money," nor, in the absence of special indication, under a bequest of "pecuniary investments,"—at least where the deposit did not exist when the will was made, and such construction will not result in an intestacy. Re Price, **5: 529,** [1905] 2 Ch. 55. Also Reported in 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44. (Annotated)

3. The prima facie and regular meaning of the term "residuary legatee" is the person taking what the law calls the residue of the personal property. Re Gibbs, **5: 136,** [1907] 1 Ch. 465. Also Reported in 76 L. J. Ch. N. S. 238, 96 L. T. N. S. 423.

4. The words "residuary legatee" by themselves prima facie do not apply to real estate, though their application may be extended so as to do so when the context requires it. Re Gibbs, **5: 136,** [1907] 1 Ch. 465. Also Reported in 76 L. J. Ch. N. S. 238, 96 L. T. N. S. 423.

5. The fact that at the date of the will the testator had no real estate other than that specifically and completely disposed of by the will should be taken into consideration in considering whether the naming of a residuary legatee constitutes a residuary devise. Re Gibbs, **5: 136,** [1907] 1 Ch. 465. Also Reported in 76 L. J. Ch. 238, 96 L. T. N. S. 423.

6. The person appointed by a testator as "residuary legatee" in a will which specifically disposed of all real estate owned by the testator at the time it was drawn, will not take realty subsequently acquired even though the phraeology of the will shows that the testator did not employ legal phraseology in its technical sense. Re Gibbs, **5: 136,** [1907] 1 Ch. 465. Also Reported in 76 L. J. Ch. N. S. 238, 96 L. T. N. S. 423. (Annotated)

WORDS AND PHRASES.

"Completion." Herdman v. Wheeler, **5: 651,** [1902] I K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

"Moneys owing to me at the time of my decease." Re Derbyshire, **5: 534,** [1906] 1 Ch. 135. Also Reported in 75 L. J. Ch. N. S. 95, 54 Week. Rep. 135, 94 L. T. N. S. 138.

"Negotiated." Herdman v. Wheeler, **5: 651,** [1902] 1 K. B. 361. Also Reported in 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300. 86 L. T. N. S. 48, 18 Times L. R. 190.

"Out of pocket expenses." Hippisley v. Knee Bros. **5: 193,** [1905] 1 K. B. 1. Also Reported in 74 L. J. K. B. N. S. 68, 92 L. T. N. S. 20, 21 Times L. R. 5.

"Pecuniary investments." Re Price, **5: 29,** [1905] 2 Ch. 55. Also Reported in 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44.

"Property passing on the death of the deceased." Re Scott, **5: 840,** [1901] 1 Q. B. 228. Also Reported in 70 L. J. Q. B. N. S. 66, 65 J. B. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148.

"Ready money." Re Price, **5: 29,** [1905] 2 Ch. 55. Also Reported in 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44.

"Residuary legatee." Re Gibbs, **5: 136,** [1907] 1 Ch. 465. Also Reported in 76 L. J. Ch. N. S. 238, 96 L. T. N. S. 423.

"Voluntary exposure to unnecessary danger." Canadian R. Acci. Ins. Co. v. McNevin, **5: 870,** 32 Can. S. C. 194.

WRECK.

Liability of insurer for loss of vessel by wreck, after her seizure by a belligerent, see Insurance.

WRIT AND PROCESS.

Where an action is brought against an alien enemy resident in the enemy's country, who carries on a branch business

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in England by means of an agent, leave may be given to the plaintiff to issue a concurrent writ and to make substituted service of a notice of the writ by service of the notice upon the defendant's agent in England. Porter v. Freudenberg, 5: 548, [1915] 1 K. B. 857. Also Reported in 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.

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